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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 408

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE OF A TRUST UNDER THE LAST WILL AND TESTAMENT OF ANGIER B. DUKE, DECEASED, FOR THE BENEFIT OF ANTHONY NEWTON DUKE, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

No. 409

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE OF A TRUST UNDER THE LAST WILL AND TESTAMENT OF ANGIER B. DUKE, DECEASED, FOR THE BENEFIT OF ANGIER B. DUKE, JR., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1940.

CERTIORARI GRANTED FEBRUARY 19, 1941.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 408

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE OF A TRUST UNDER THE LAST WILL AND TESTAMENT OF ANGIER B. DUKE, DECEASED, FOR THE BENEFIT OF ANTHONY NEWTON DUKE, PETITIONER,

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vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES BOARD OF TAX APPEALS.

Docket No. 76031.

1

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust under the Last Will and Testament of Angier
B. Duke, deceased, for the benefit of Anthony Newton
Duke,**

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

2

Docket Entries.

APPEARANCES:

**For Petitioner: GEORGE H. CRAVEN, ESQ., ROLLIN BROWNE,
ESQ.**

For Respondent: J. R. JOHNSTON, ESQ., E. M. WOOLF, ESQ.

1934

**May 4—Petition received and filed. } Taxpayer notified:
(Fee paid.)**

3

May 4—Copy of petition served on General Counsel.

June 12—Answer filed by General Counsel.

June 20—Copy of answer served on taxpayer.

1937

**Dec. 9—Notice issued placing proceeding on New York
Calendar.**

1938

Feb. 26—Hearing set April 25, 1938, New York City.

Docket Entries.

- 4 Apr. 26—Hearing had before Mr. Disney on merits. Submitted. Motion of petitioner to consolidate dockets 76031 and 76046 granted. Stipulation of facts and notice of death of counsel for petitioner filed. Petitioner's brief due 5/26/38. Respondent's brief due June 27, 1938. Reply due 7/11/38.
- May 16—Transcript of hearing of April 26, 1938 filed.
- May 26—Brief filed by taxpayer. 5/26/38 copy served on General Counsel.
- July 9—Motion for leave to file brief nunc pro tunc as of June 26, 1938 filed by General Counsel. Brief lodged by General Counsel. 7/12/38 granted.
- 5 Aug. 4—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 8/5/38 granted.
- Aug. 8—Copy of motion and reply brief served on General Counsel.
- 1939
- Jan. 4—Findings of fact and opinion rendered—Richard L. Disney, Division 4. Decision will be entered under Rule 50.
- Jan. 25—Computation of deficiency filed by General Counsel.
- Jan. 27—Hearing set Feb. 15, 1939 on settlement.
- Feb. 3—Motion for rehearing and reconsideration, and memorandum in support of motion, filed by taxpayer.
- 6 Feb. 13—Motion for 30 days continuance upon the computation under Rule 50 filed by taxpayer.
- Feb. 14—Motion granted to 3/15/39.
- Feb. 16—Order that motion for reopening and reconsideration be denied entered.
- Mar. 15—Hearing had before Mr. Arundell on settlement under Rule 50—respondent's recomputation not contested—referred to Mr. Disney for decision.
- Mar. 23—Decision entered—R. L. Disney, Division 4.

Docket Entries.

- June 22—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer. 7
- June 22—Proof of service filed by taxpayer.
- Aug. 15—Motion for extension to 9/15/39 to prepare and transmit record filed by taxpayer.
- Aug. 15—Order enlarging time to 9/15/39 to prepare and transmit record entered.
- Aug. 24—Order from U. S. Circuit Court of Appeals, Second Circuit, granting stipulation to consolidated dockets 76031 and 76046 into one record, filed.
- Sept. 7—Agreed statement of evidence lodged by taxpayer.
- Sept. 7—Praecipe with proof of service thereon filed—no counter praecipe will be filed. 8
- Sept. 8—Agreed statement of evidence approved and ordered filed.
- Sept. 13—Order enlarging time for transmission and delivery of record to Sept. 30, 1939, entered.
- 9

Docket Entries.

10

UNITED STATES BOARD OF TAX APPEALS.**Docket No. 76046.**

CITY BANK FARMERS TRUST COMPANY, as Trustee of Trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the benefit of Angier B. Duke, Jr.,
Petitioner,

vs.

11

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES:

For Petitioner: GEORGE H. CRAVEN, ESQ., ROLLIN BROWNE,
ESQ.

For Respondent: J. R. JOHNSTON, ESQ., D. HURD HUDSON,
ESQ., E. M. WOOLF, ESQ.

1934

12

May 4—Petition received and filed. Taxpayer notified.
(Fee paid.)

May 4—Copy of petition served on General Counsel.

June 12—Answer filed by General Counsel.

June 19—Copy of answer served on taxpayer.

1937

Dec. 9—Notice issued placing proceeding on New York
Calendar.

1938

Feb. 26—Hearing set April 25, 1938, New York, N. Y.

Docket Entries.

- Apr. 26—Hearing had before Mr. Disney on merits. Submitted. Motion of petitioner to consolidate dockets 76031 and 76046 granted. Entry of appearance of Rollin Browne, Stipulation of facts and notice of death of counsel for petitioner filed. Petitioner's brief due 5/26/38—respondent's brief due 6/27/38—reply due 7/11/38. 13
- May 16—Transcript of hearing of April 26, 1938 filed.
- May 26—Brief filed by taxpayer. 5/26/38 copy served on General Counsel.
- July 9—Motion for leave to file brief nunc pro tunc as of June 26, 1938 filed by General Counsel. Brief lodged. 7/12/38 granted.
- Aug. 4—Motion for leave to file reply brief filed by taxpayer—reply brief lodged. 8/5/38 granted. 14
- Aug. 8—Copy of motion and reply brief served on General Counsel.
- 1939
- Jan. 4—Findings of fact and opinion rendered—Richard L. Disney, Division 4. Decision will be entered under Rule 50.
- Jan. 25—Computation of deficiency filed by General Counsel.
- Jan. 27—Hearing set Feb. 15, 1939 on settlement.
- Feb. 3—Motion for rehearing and reconsideration, and memorandum in support of motion, filed by taxpayer. 15
- Feb. 13—Motion for 30 days continuance on the computation under Rule 50 filed by taxpayer.
- Feb. 14—Motion granted to 3/15/39.
- Feb. 16—Order that motion to reopen and reconsider be denied, entered.
- Mar. 15—Hearing had before Mr. Arundell on settlement under Rule 50. Respondent's recomputation not contested. Referred to Mr. Disney for decision.

Docket Entries.

- 16 Mar. 23—Decision entered—R. L. Disney, Division 4.
June 22—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.
June 22—Proof of service filed by taxpayer.
Aug. 15—Motion for extension of time to Sept. 15, 1939 to prepare and transmit record filed by taxpayer.
Aug. 15—Order enlarging time to Sept. 15, 1939 to prepare and transmit record entered.
Aug. 24—Order from U. S. Circuit Court of Appeals, Second Circuit, granting stipulation to consolidate dockets 76031 and 76046 into one record filed.
- 17 Sept. 7—Agreed statement of evidence lodged.
Sept. 7—Praecipe with proof of service thereon filed. No counter praecipe will be filed.
Sept. 8—Agreed statement of evidence approved and ordered filed.
Sept. 13—Order enlarging time for transmission and delivery of record to Sept. 30, 1939, entered.

Petition.

19

UNITED STATES BOARD OF TAX APPEALS.**Docket No. 76031.**

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the benefit of Anthony Newton Duke,
Petitioner,**

—against—**COMMISSIONER OF INTERNAL REVENUE,****Respondent. 20**

The above-named petitioner, City Bank Farmers Trust Company, a corporation, as trustee of a trust under the last will and testament of Angier B. Duke, deceased, for the benefit of Anthony Newton Duke, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols "IT:AR:A-2 KVN-60D" and dated March 7, 1934, and as a basis for this proceeding alleges as follows, upon information and belief:

21

1. The said Angier B. Duke died on September 3, 1923, a resident of the City, County and State of New York, leaving a last will and testament wherein and whereby he created a trust for the benefit of Anthony Newton Duke and wherein and whereby he appointed City Bank Farmers Trust Company (formerly known as The Farmers' Loan and Trust Company), as trustee. The said last will and testament was duly admitted to probate in the Surrogates' Court of New York County, New York, to which jurisdiction in that behalf belonged, on September 18, 1923, and

Petition.

22 on or about that date the said City Bank Farmers Trust Company duly qualified as trustee under said will. The said City Bank Farmers Trust Company since said date has been and is now the duly appointed qualified and acting trustee under the last will and testament of the said Angier B. Duke, deceased. The address of the said City Bank Farmers Trust Company is No. 22 William Street, New York, N. Y. A copy of the material portions of said will is hereto attached, marked "Exhibit A", and made a part hereof.

23 2. The notice of deficiency, a copy of which is hereto attached, marked "Exhibit B", and made a part hereof, was mailed to the petitioner on March 7, 1934.

3. The taxes in controversy are income taxes for the calendar year 1931. The Commissioner has determined a deficiency in the sum of \$2,202.51, and the petitioner asks that this Board determine an overassessment in the sum of \$7,986.96, making the total taxes in controversy \$10,189.47.

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

21 (a) The respondent has erroneously disallowed on the petitioner's return for 1931 a credit of \$2,936.69, or such other sum as may be proper, and a deduction of \$2,157.02, or such other sum as may be proper, to which it is entitled for taxes paid by it to the Kingdom of Great Britain on dividends received in that year from British corporations.

(b) The respondent has erroneously failed to allow as a deduction on the petitioner's return for 1931 a deduction in the sum of \$38,641.71 to which it is entitled for commissions paid for the services of the trustee in managing the said trust.

Petition.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows: 25

(a) (1) The petitioner in the year 1931, as part of its undistributable and undistributed income which was taxable to it, received dividends of \$20,484.37 which were declared and paid in that year on stock which it held of the British-American Tobacco Co., Ltd., a British corporation, and dividends of \$1,280.05 which were declared and paid in that year on stock which it held of the Tobacco Securities Trust Co., Ltd., a British corporation, a total of \$21,764.42 in dividends on stocks of British corporations. The petitioner paid income taxes of \$5,093.71 to the Kingdom of Great Britain in 1931 on said dividends. The said British taxes were and are allowable as a credit against the 1931 Federal income tax of the petitioner to an amount not exceeding the same proportion of said Federal income tax for said year which the decedent's net income for said year from sources without the United States bears to its total net income for said year, pursuant to the provisions of Section 131 of the Revenue Act of 1928, and the balance of said British taxes not allowable as a credit were and are allowable as a deduction in computing net income, pursuant to the provisions of Section 23(c) of said Act. 26

(2) The respondent has erroneously determined that the said taxes were assessed against and paid by the said British corporations, and not by the petitioner; that therefore, said taxes are not allowable as a credit and deduction to the petitioner, but that the petitioner is taxable only on dividends in the sum of \$16,670.71, representing the difference between the said dividends of \$21,764.42 which were declared and paid by said British corporations, and the amount of British taxes in the sum of \$5,093.71 which were paid by the petitioner thereon. The petitioner alleges that although it is true that the Kingdom of Great Britain imposes its income tax on the income and profits of its 27

Petition.

28 corporations, the law imposing such tax provides that the corporations may recoup such tax from their stockholders by deducting it from the dividends declared and paid by them; that the stockholders of such corporations are required to include the gross amount of the dividends declared and paid in their tax returns, and that such stockholders are entitled to credit against their tax liabilities the amounts of such taxes so deducted and withheld at the source from their dividends. The petitioner therefore alleges that the said British taxes of \$5,093.71 were paid and borne by it and that the credit of \$2,936.69 and the deduction of \$2,157.02 which were claimed on its said
29 return on account of said British taxes should be allowed in full.

(b) The petitioner in the year 1931 paid to itself as trustee of said trust commissions in the sum of \$38,641.71 for its services in conserving and managing the affairs of the said trust estate. The said commissions were computed on the basis of the principal amount of said trust, but the petitioner alleges that they are properly allowable as a deduction in computing the income which is taxable to the said trust entity.

WHEREFORE, the petitioner prays that this Board may
30 hear the proceeding and determine:—

(a) That the British taxes in the sum of \$5,093.71 which were deducted and paid at the source on dividends on stocks which the petitioner held in British corporations were paid by the petitioner.

(b) That the petitioner is entitled to a credit of \$2,936.69, or such other sum as may be proper, and a deduction of \$2,157.02, or such other sum as may be proper, in computing his net taxable income for the year 1931, by reason of said British taxes of \$5,093.71.

Petition.

(c) That the petitioner is entitled to an additional deduction of \$38,641.71 for trustee's commissions paid in the year 1931. 31

(d) That there is no deficiency in the tax of the petitioner for the year 1931.

(e) That there is an overassessment of \$7,986.96 in favor of the petitioner for the year 1931.

CITY BANK FARMERS TRUST COMPANY,
as Trustee of a trust under the last will and
testament of Angier B. Duke, deceased, for
the benefit of Anthony Newton Duke,

By ELIOT ATWATER,
Trust Officer. 32

RUSSELL L. BRADFORD,
GEORGE H. CRAVEN,
Counsel for Petitioner,
Office and P. O. Address,
22 Exchange Place,
New York, N. Y.

TAYLOR, BLANC, CAPRON & MARSH,
22 Exchange Place,
New York, N. Y.
Of Counsel. 33

State of New York,
County of New York—ss.:

ELIOT ATWATER, being duly sworn, deposes and says that he is a Trust Officer of City Bank Farmers Trust Company, the petitioner named in the foregoing petition; that he has

Exhibit A, Annexed to Petition.

34 read the said petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ELIOT ATWATER.

Sworn to before me this
3rd day of May 1934.

THOMAS I. FITZGERALD,
Notary Public, New York County,
N. Y. Co. Clks. No. 105, Reg. No. 5F314.
35 Commission expires March 30, 1935.
(Seal)

EXHIBIT A, ANNEXED TO PETITION.

The entire will of which Exhibit A is a part is printed herein at pages 72 to 81, inclusive, as Exhibit A, Annexed to Stipulation of Facts.

EXHIBIT B, ANNEXED TO PETITION.

37

TREASURY DEPARTMENT
WASHINGTONOffice of
Commissioner of Internal RevenueAddress Reply to
Commissioner of Internal Revenue
and refer toTrustee, Anthony Newton Duke,
u/w A. B. Duke,
City Bank Farmers Trust Co., Trustee,
22 William Street,
New York, New York.

38

Sirs:

You are advised that the determination of your income tax liability for the year 1931, discloses a deficiency of \$2,202.51 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928 notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

39

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date

Exhibit B, Annexed to Petition.

40 assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest at the rate of 6% per annum will accumulate.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHARLES T. RUSSELL,
Deputy Commissioner.

Encloses:
Statement
Form 870

STATEMENT

IT:AR:A-2
KVN-60D

In re: Trustee Anthony Newton Duke,
n/w A. Duke,
City Bank Farmers Trust Company, Trustee,
22 William Street,
New York, New York

42

Income Tax Liability

| Year | Income Tax Liability | Income Tax Assessed | Deficiency |
|------|-------------------------|------------------------|------------|
| 1931 | \$15,078.79 | \$12,876.28 | \$2,202.51 |

The amount of \$2,936.79 claimed as a credit on line 54 as income tax paid to a foreign country has been disallowed as a credit. The deduction of \$2,157.02 claimed as the "balance of British Tax not claimed item #54"

Exhibit B, Annexed to Petition.

has been disallowed. Foreign income to be reported under item 11 has been computed as follows: 43

| | |
|---|-------------|
| Gross foreign income | \$21,764.42 |
| Less: | |
| Tax withheld | 5,093.71 |
| Net foreign income to be reported, item 11(a) | \$16,670.71 |
| Amount reported on return | 21,764.42 |
| Decrease in item 11 | \$ 5,093.71 |

There is no provision in the revenue laws permitting an individual owning stock in a foreign corporation to claim as a deduction or a credit, income tax assessed against a foreign corporation. This office holds that the income tax purported to have been withheld from dividend distributions by the British corporation was in fact the liability of the payor corporation. Therefore, the only amount that should be reported in gross income is the amount actually received, that is, \$16,670.71. Correspondingly, the amount of \$2,936.69 claimed as a credit and the deduction of \$2,157.02 have been disallowed. 44

Computation of Adjusted Net Income

45

| | |
|---|--------------|
| Ordinary net income reported on return | \$119,046.95 |
| Deduction for balance of British tax disallowed | 2,157.02 |
| Total | \$121,203.97 |
| Less: | |
| Decrease in item 11 | 5,093.71 |
| Adjusted ordinary taxable income | \$116,110.26 |
| Capital net loss | \$ 872.61 |

Exhibit B, Annexed to Petition.

46

Computation of Tax

| | | |
|--------------------------|--|--------------|
| Adjusted ordinary income | | \$116,110.26 |
|--------------------------|--|--------------|

Less:

| | | |
|--------------------|--------------|------------|
| Dividends | \$104,055.62 | |
| Personal exemption | 1,500.00 | 105,555.62 |

| | | |
|-------------------------------|--|--------------|
| Balance subject to normal tax | | \$ 10,554.64 |
|-------------------------------|--|--------------|

| | | |
|----------------------------------|--|----------|
| Normal tax at 11½% on \$4,000.00 | | \$ 60.00 |
|----------------------------------|--|----------|

| | | |
|--------------------------------|--|--------|
| Normal tax at 3% on \$4,000.00 | | 120.00 |
|--------------------------------|--|--------|

| | | |
|--------------------------------|--|--------|
| Normal tax at 5% on \$2,554.64 | | 127.73 |
|--------------------------------|--|--------|

| | | |
|------------------------|--|-----------|
| Surtax on \$116,110.26 | | 14,882.05 |
|------------------------|--|-----------|

47

| | | |
|-------|--|--------------|
| Total | | \$ 15,189.78 |
|-------|--|--------------|

Less:

| | | |
|-------------------------|----------|--|
| Tax at 12½% on \$872.61 | \$109.09 | |
|-------------------------|----------|--|

| | | |
|--------------------|------|--------|
| Tax paid at source | 1.90 | 110.99 |
|--------------------|------|--------|

| | | |
|----------------------|--|--------------|
| Income tax liability | | \$ 15,078.79 |
|----------------------|--|--------------|

| | | |
|---------------------|--|-----------|
| Income tax assessed | | 12,876.28 |
|---------------------|--|-----------|

| | | |
|-------------------|--|-------------|
| Deficiency in tax | | \$ 2,202.51 |
|-------------------|--|-------------|

48

Answer.**UNITED STATES BOARD OF TAX APPEALS.**

49

Docket No. 76031.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust under the Last Will and Testament of Angier B. Duke, deceased, for the benefit of Anthony Newton Duke,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent. 50

The respondent, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, filed May 4, 1934, admits and denies as follows:

1, 2, 3. Admits the averments contained in paragraphs 1, 2, and 3 of the petition.

4. Denies the averments contained in paragraph 4 of the petition.

5. For lack of sufficient information upon which to form a belief, denies the remaining averments of the petition and will require proof thereof upon the hearing of this appeal. 51

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Signed) ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

HAROLD ALLEN,
Special Attorney,
Bureau of Internal Revenue.

Petition.

52

UNITED STATES BOARD OF TAX APPEALS.**Docket No. 76046.**

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a
trust under the Last Will and Testament of Angier B.
Duke, deceased, for the benefit of Angier B. Duke, Jr.,
Petitioner,**

—against—**COMMISSIONER OF INTERNAL REVENUE,****Respondent.**

53

The above-named petitioner, City Bank Farmers Trust Company, a corporation, as trustee of a trust under the last will and testament of Angier B. Duke, deceased, for the benefit of Angier B. Duke, Jr., hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols "IT:AR:A-2 KVN-60D" and dated March 7, 1934, and as a basis for this proceeding alleges as follows, upon information and belief:

54

1. The said Angier B. Duke died on September 3, 1923, a resident of the City, County and State of New York, leaving a last will and testament wherein and whereby he created a trust for the benefit of Angier B. Duke, Jr. and wherein and whereby he appointed City Bank Farmers Trust Company (formerly known as The Farmers' Loan and Trust Company), as trustee. The said last will and testament was duly admitted to probate in the Surrogates' Court of New York County, New York, to which jurisdiction in that behalf belonged, on September 18, 1923, and on or about that date the said City Bank Farmers Trust

Petition.

Company duly qualified as trustee under said will. The said City Bank Farmers Trust Company since said date has been and is now the duly appointed qualified and acting trustee under the last will and testament of the said Angier B. Duke, deceased. The address of the said City Bank Farmers Trust Company is No. 22 William Street, New York, N. Y. A copy of the material portions of said will is hereto attached, marked "Exhibit A", and made a part hereof.

55

2. The notice of deficiency, a copy of which is hereto attached, marked "Exhibit B", and made a part hereof, was mailed to the petitioner on March 7, 1934.

56

3. The taxes in controversy are income taxes for the calendar year 1931. The Commissioner has determined a deficiency in the sum of \$2,199.01, and the petitioner asks that this Board determine an overassessment in the sum of \$7,994.56, making the total taxes in controversy \$10,193.57.

4. The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent has erroneously disallowed on the petitioner's return for 1931 a credit of \$2,930.94, or such other sum as may be proper, and a deduction of \$2,163.70, or such other sum as may be proper, to which it is entitled for taxes paid by it to the Kingdom of Great Britain on dividends received in that year from British corporations.

57

(b) The respondent has erroneously failed to allow as a deduction on the petitioner's return for 1931 a deduction in the sum of \$38,641.06 to which it is entitled for commissions paid for the services of the trustee in managing the said trust.

Petition.

- 58 . 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

59 (a) (1) The petitioner in the year 1931, as part of its undistributable and undistributed income which was taxable to it, received dividends of \$20,488.10 which were declared and paid in that year on stock which it held of the British-American Tobacco Co., Ltd., a British corporation, and dividends of \$1,280.28 which were declared and paid in that year on stock which it held of the Tobacco Securities Trust Co., Ltd., a British corporation, a total of \$21,768.38 in dividends on stocks of British corporations. The petitioner paid income taxes of \$5,094.64 to the Kingdom of Great Britain in 1931 on said dividends. The said British taxes were and are allowable as a credit against the 1931 Federal income tax of the petitioner to an amount not exceeding the same proportion of said Federal income tax for said year which the decedent's net income for said year from sources without the United States bears to its total net income for said year, pursuant to the provisions of Section 131 of the Revenue Act of 1928, and the balance of said British taxes not allowable as a credit were and are allowable as a deduction in computing net income, pursuant to the provisions of

60 Section 23 (c) of said Act.

(2) The respondent has erroneously determined that the said taxes were assessed against and paid by the said British corporations, and not by the petitioner; that therefore, said taxes are not allowable as a credit and deduction to the petitioner, but that the petitioner is taxable only on dividends in the sum of \$16,673.74, representing the difference between the said dividends of \$21,768.38 which were declared and paid by said British corporations, and

Petition.

the amount of British taxes in the sum of \$5,094.64 which were paid by the petitioner thereon. The petitioner alleges that although it is true that the Kingdom of Great Britain imposes its income tax on the income and profits of its corporations, the law imposing such tax provides that the corporations may recoup such tax from their stockholders by deducting it from the dividends declared and paid by them; that the stockholders of such corporations are required to include the gross amount of the dividends declared and paid in their tax returns, and that such stockholders are entitled to credit against their tax liabilities the amounts of such taxes so deducted and withheld at the source from their dividends. The petitioner therefore alleges that the said British taxes of \$5,094.64 were paid and borne by it and that the credit of \$2,930.94 and the deduction of \$2,163.70 which were claimed on its said return on account of said British taxes should be allowed in full.

(b) The petitioner in the year 1931 paid to itself as trustee of said trust commissions in the sum of \$38,641.06 for its services in conserving and managing the affairs of the said trust estate. The said commissions were computed on the basis of the principal amount of said trust, but the petitioner alleges that they are properly allowable as a deduction in computing the income which is taxable to the said trust entity.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine:

(a) That the British taxes in the sum of \$5,094.64 which were deducted and paid at the source on dividends on stocks which the petitioner held in British corporations were paid by the petitioner.

Petition.

64

(b) That the petitioner is entitled to a credit of \$2,930.94, or such other sum in excess thereof as may be proper, and a deduction of \$2,163.70, or such other sums as may be proper, in computing his net taxable income for the year 1931, by reason of said British taxes of \$5,094.64.

(c) That the petitioner is entitled to an additional deduction of \$38,641.06 for trustee's commissions paid in the year 1931.

(d) That there is no deficiency in the tax of the petitioner for the year 1931.

65

(e) That there is an overassessment of \$7,994.56 in favor of the petitioner for the year 1931.

CITY BANK FARMERS TRUST COMPANY,
as Trustee of a trust under the last will and
testament of Angier B. Duke, deceased, for
the benefit of Angier B. Duke, Jr.,

By **ELIOT ATWATER,**
Trust Officer.

RUSSELL L. BRADFORD,
GEORGE H. CRAVEN,

Counsel for Petitioner,
Office and P. O. Address,

22 Exchange Place,
New York, N. Y.

66

TAYLOR, BLANC, CAPRON & MARSH,
22 Exchange Place,
New York, N. Y.,
Of Counsel.

Exhibit A, Annexed to Petition.

State of New York,
County of New York—ss.:

67

ELIOT ATWATER, being duly sworn, deposes and says that he is a Trust Officer of City Bank Farmers Trust Company, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

ELIOT ATWATER.

68

Sworn to before me this
3rd day of May, 1934.

THOMAS I. FITZGERALD,
Notary Public,
New York County.

N. Y. Co. Clks. No. 105, Reg. No. 5F314.

Commission expires March 30, 1935.

(Seal) -

~~EXHIBIT A, ANNEXED TO PETITION.~~

69

The entire will of which Exhibit A is a part is printed herein at pages 72 to 81, inclusive, as Exhibit A, Annexed to Stipulation of Facts.

EXHIBIT B, ANNEXED TO PETITION.

70

TREASURY DEPARTMENT
Washington

Office of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue

Mar. 7 1934

Trust Angier B. Duke, Jr.,
u/w A. B. Duke,
c/o City Bank Farmers Trust Co., Trustee,
22 William Street,
New York, New York

71

Sirs:

You are advised that the determination of your income tax liability for the year 1931, discloses a deficiency of \$2,199.01 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

72

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS

Exhibit B, Annexed to Petition.

FORM IS NOT FILED, interest at the rate of 6% per annum 73
will accumulate.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHARLES T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement
Form 870

74

STATEMENT

IT:AR:A-2
KVN-60D

In re: Trust Angier B. Duke, Jr.,
u/w A. B. Duke,
c/o City Bank Farmers Trust Co., Trustee,
22 William Street,
New York, New York.

75

| Year | Income Tax Liability | | |
|------|----------------------|---------------------|------------|
| | Income Tax Liability | Income Tax Assessed | Deficiency |
| 1931 | \$15,066.00 | \$12,866.99 | \$2,199.01 |

The amount of \$2,930.94 claimed as a credit on line 54 for income tax paid to a foreign country has been disallowed. The deduction of \$2,163.70 claimed on line 18 as the balance of British tax not claimed in item 54, has

Exhibit B, Annexed to Petition.

76 been disallowed. The amount of foreign income to be reported under item 11 has been computed as follows:

| | |
|------------------------------------|-------------|
| Gross foreign income, item 11 | \$21,768.38 |
| Less | |
| Tax withheld by payor corporation | 5,094.64 |
| Net foreign income | \$16,673.74 |
| Amount reported, item 11 of return | 21,768.38 |
| Decrease in income | \$ 5,094.64 |

77 There is no provision in the revenue laws permitting an individual owning stock in a foreign corporation to claim as a deduction or a credit, income tax assessed against a foreign corporation. This office holds that the income tax purported to have been withheld from dividend distributions by the British corporation was in fact the liability of the payor corporation. Therefore, the only amount that should be reported in gross income is the amount actually received, that is, \$16,673.74. Correspondingly, the amount of \$2,930.94 claimed as a credit and the deduction of \$2,163.70 have been disallowed.

Computation of Adjusted Net Income

| | |
|---|--------------|
| 78 Ordinary net income reported on return | \$119,200.80 |
| Deduction disallowed | 2,163.70 |
| Total | \$121,364.50 |
| Less: | |
| Decrease in foreign income | 5,094.64 |
| Adjusted ordinary income | \$116,269.86 |
| Capital loss | \$ 1,295.04 |

Exhibit B, Annexed to Petition.

Computation of Tax

79

Adjusted ordinary income - \$116,269.86

Less:

Dividends \$104,069.73

Personal exemption 1,500.00 105,569.73

Balance subject to normal tax \$ 10,700.13

Normal tax at 1½% on \$4,000.00 \$ 60.00

Normal tax at 3% on \$4,000.00 120.00

Normal tax at 5% on \$2,700.13 135.01

Surtax on \$116,269.86 14,913.97

Total \$ 15,228.98 80

Less:

Tax at 12½% on \$1,295.04 \$161.88

Tax paid at source 1.10 162.98

Income tax liability \$ 15,066.00

Income tax assessed 12,866.99

Deficiency in tax \$ 2,199.01

81

Answer.

82

UNITED STATES BOARD OF TAX APPEALS**Docket No. 76046.**

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
trust under the Last Will and Testament of Angier B.
Duke, deceased, for the benefit of Angier B. Duke, Jr.,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

83

The respondent, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer, filed May 4, 1934, admits and denies as follows:

1, 2, 3. Admits the averments contained in paragraphs 1, 2, and 3 of the petition.

4. Denies the averments contained in paragraph 4 of the petition.

5. For lack of sufficient information upon which to form a belief, denies the remaining averments of the petition and will require proof thereof upon the hearing of this appeal.

84

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Signed) ROBERT H. JACKSON,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

HAROLD ALLEN,
Special Attorney,
Bureau of Internal Revenue.

HA-afh 6-12-34

Motion for Consolidation.

85

UNITED STATES BOARD OF TAX APPEALS**Docket No. 76031.**

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust under the Last Will and Testament of Angier B.
Duke, deceased, for the benefit of Anthony Newton
Duke,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

86

Respondent.

Docket No. 76046.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust under the Last Will and Testament of Angier B.
Duke, deceased, for the benefit of Angier B. Duke, Jr.,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent. 87

Now come the petitioners in the above-entitled proceedings, by their undersigned counsel, and respectfully represent that the same issue and the same facts are involved in the two above-entitled proceedings and that it would result in much saving of time to the Board and to counsel for the respective parties if the cases should be consolidated

Motion for Consolidation.

88 for hearing. The petitioners accordingly respectfully move that the Board enter an order consolidating said cases.

Dated April 26, 1938.

GEORGE H. CRAVEN,
Counsel for Petitioners,
20 Exchange Place,
New York, N. Y.

No objection.

89 J. P. WENCHEL,
Chief Counsel for
Bureau of Internal Revenue,
Counsel for Respondent.

(Seal)

Filed at Hearing,
April 26, 1938.
Granted, Apr. 26, 1938,
(s) R. L. DISNEY,
Member U. S. Board of Tax Appeals.

Findings of Fact and Opinion.

UNITED STATES BOARD OF TAX APPEALS

91

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE OF A TRUST UNDER THE LAST WILL AND TESTAMENT OF ANGIER B. DUKE, DECEASED, FOR THE BENEFIT OF ANTHONY NEWTON DUKE, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE OF A TRUST UNDER THE LAST WILL AND TESTAMENT OF ANGIER B. DUKE, DECEASED, FOR THE BENEFIT OF ANGIER B. DUKE, JR., PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

92

Docket Nos. 76031, 76046. Promulgated January 4, 1939.

In 1931 the petitioner, as trustee, pursuant to a court decree entered in connection with an intermediate accounting, paid to itself and charged to corpus the trustee commissions allowed under a state statute for receiving principal and paying it out. *Held*, that the trustee was not carrying on a trade or business, and therefore commissions are not deductible as ordinary and necessary business expense.

G. H. Carven, Esq., and Rollin Browne, Esq., for the petitioner.

93

J. R. Johnston, Esq., and D. Hurd Hudson, Esq., for the respondent.

These proceedings were consolidated for hearing and report and involve the redetermination of deficiencies of \$2,202.51 and \$2,199.01 in income tax for 1931 of the petitioner as trustee of the respective trusts, as to which petitioner contends for overassessments of \$7,986.96 and \$7,994.56, respectively. An issue raised in each proceeding

Findings of Fact and Opinion.

- 94 respecting a credit taken for foreign taxes has been abandoned. The parties disposed of another issue by stipulating the amount to be included in the taxable income of each trust for dividends received from a foreign corporation. The remaining issue, common to both cases, is whether certain trustee's commissions are deductible from gross income of the trust. The stipulation of facts filed in the cases is adopted by reference as part of our findings of fact.

FINDINGS OF FACT.

- 95 The petitioner, City Bank Farmers Trust Co., as trustee of two trusts under the will of Angier B. Duke, is a New York corporation engaged in the business of a trust company in the State of New York. It qualified in September 1923 as trustee under the will of Angier B. Duke, deceased, and since then has acted as such.

The will of the decedent created two trusts, one for the benefit of Angier B. Duke, Jr., and the other for the benefit of Anthony Newton Duke. The petitioner received the property of the trusts in the amount of \$3,823,027.79 in each trust in February 1926.

- 96 On January 2, 1931, the Surrogate's Court of New York, which had jurisdiction of the trust estates, issued a decree in a proceeding instituted by the petitioner in 1930 for settlement of an intermediate accounting for the period from February 26, 1926, to December 31, 1929, authorizing the petitioner to retain and pay to itself as trustee out of the existing corpus of the respective trust estates, as commissions to which it was entitled under the provisions of the decedent's will, the sums of \$38,641.71 and \$38,641.06. The commissions were computed pursuant to the provisions of section 285 of the Surrogate's Court Act of New York, on the basis of principal received and paid out by the petitioner as trustee. Subsequently, during the same months, the petitioner paid the sums authorized by the court to

Findings of Fact and Opinion.

itself as trustee out of the principal of the respective trusts. 97
 The amounts so paid were not deducted by the petitioner in income tax returns filed for the taxable year, but petitioner asks in the petition, in each proceeding, for a determination of overassessment in accordance with such payments. Although deductions for other commissions with respect to the current transactions within the taxable year for receiving and paying out income are not listed in the income tax reports filed for the two trusts, and are not mentioned in the deficiency notices, the parties are in agreement that such commissions have been allowed by the respondent. The report made to the Surrogate by petitioner showed commissions retained each year by the petitioner on account of income received and paid out, during the period covered by the report to the Surrogate, the amounts being 98
 \$10,663.22 as to one trust and \$10,674.60 as to the other.

The report filed for the period from February 26, 1926, to December 31, 1929, showed an increase of corpus in one trust of \$21,635.44 and in the other of \$21,580.44, and income received of \$962,359.54 as to one of the trusts and \$963,277.83 as to the other; charged expense against principal in the one trust in the amount of \$12,806.75 and in the other of \$12,798.62; charged expense against income of \$29,608.74 as to the one trust and \$29,815.82 as to the other, which amounts of expense in each case were entirely for payment of state and Federal taxes, except \$2.50 for notary 99
 fees and \$1 for cost of Federal stamps on the transfer of 250 rights in Marland Oil Co. For 1931 the income of one estate was \$126,729.09 from interest and dividends (nothing being reported under the heading "Net profit from trade or business"), with loss on sale of securities of \$872.61, while as to the other estate the income was \$126,460.28 from interest and dividends (nothing being reported under the heading "Net profit from trade or business"), with loss on sale of securities of \$1,295.06. The loss of \$872.61 was taken upon the sale for a total price of \$86,670.38 of nine

Findings of Fact and Opinion.

100 items of bonds and stocks, all acquired in 1926, except two items acquired in 1928 in the total amount of \$238.10. The loss of \$1,295.06 was taken upon the sale of twelve items of bonds and stocks in the total sum of \$90,430.42, all of the items being purchased in 1926, except one item of \$138.91 purchased in 1928. For the year 1931 the income tax report as to the one trust asks deduction of \$5.50 (in addition to taxes paid) and the other asks deduction of \$6.11 (in addition to taxes paid). The ledger of the trust for Angier B. Duke, Jr., for 1931 shows total expense items of \$13.27 charged against principal, being cost of Federal stamps and cost of insurance and postage upon bonds, and \$14.68 being cost of collection of coupons shown as expense against income; also \$30.52 costs and disbursements taxed in the Surrogate's decree of January 2, 1931. The ledger for 1931 for the trust for Anthony Newton Duke shows expense items against principal totaling \$13.03, being the cost of transfer stamps and insurance and postage on transfer of bonds; and a total of \$15.71 expense against income, being cost of collection of coupons, and \$1 for transfer stamps; also \$30.53 costs and disbursements taxed in the Surrogate's decree of January 2, 1931.

101 In 1931 the petitioner, as trustee of each trust, claimed deductions of about \$5,200, and distributed about \$6,300 to the beneficiary thereof out of the gross income, leaving in each case approximately \$115,000 for distribution to the beneficiary when he should become of age. For the taxable year the trustee reported a tax liability of approximately \$13,000, all of which was paid in 1932. The petitioner, as trustee of the trusts, at all times important, kept its books and rendered its income tax returns on the cash basis.

102 The provisions of the decedent's will distributed to the trustee for each of his two sons one-fourth of his residuary estate in trust to collect and receive the income, revenues, and profits, and to apply and distribute them to the support, education, and maintenance of the son for his life,

Findings of Fact and Opinion.

and after his death for the support, education and maintenance of his lineal descendants, payments, applications, and distributions during minority to be under the uncontrolled discretion of the trustee, with specific provision that: 103

The said Trustee shall have power to hold, manage and invest, and from time to time as need be, to re-invest the properties held in said Trust for the benefit and advantage of the beneficiaries thereof in such good and productive stocks, bonds or mortgages as will produce, if possible, a sure and regular income.

The said Trustee and its successors shall have power to retain any investments made by me in my lifetime without liability for loss or shrinkage, or to change the property received by it under this will into other property as it deems best for the respective beneficiaries, and to that end it shall have power to sell, assign, transfer, exchange, deliver and convey any property at any time, and it shall invest the proceeds of all such sales and exchanges in any property it thinks best; but in all investments I charge it and its successors to be more careful as to the security of the funds than as to the acquisition of higher rates of interest, my desire being to have my property prudently and securely managed rather than hazarded in what may promise great gains. 104 105

* * * * *

Said Trustee shall have power to pay all taxes, levies and assessments which may be validly imposed upon the Trust Estate, or any part thereof or in respect thereof, or which may be incurred in the exercise of any of the powers conferred by this will, as well as all costs, charges and expenses of administering this Trust, which shall include adequate insurance, necessary repairs, and compensation to the Trustee for its service as such.

Findings of Fact and Opinion.

106 The duties of the petitioner as trustee of the trusts consisted in general of causing its investment committee to review several times each year the securities comprising the corpus of the trust; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends on securities; paying expenses of the trusts; distributing income to beneficiaries; keeping the books of account of the trusts; rendering statements to the interested parties; and preparing and filing income tax returns. The petitioner was trustee of about 300 other trusts involving similar duties.

107 The current diary of action taken by the trustee in the estate of Anthony Newton Duke shows 18 items throughout the year 1931, while the current diary in the estate of Angier B. Duke, Jr., shows 19 items. With one exception, the two diaries are duplicates. The investments referred to are all bonds and stocks.

Generally trustees administering estates under the laws of New York do not make application to the court for trustee's commissions until reason exists for filing an accounting with the court. The accounting was filed in 1930 in order to obtain the court's construction of provisions of the decedent's will.

OPINION.

108

DISNEY: The petitioner contends and respondent denies that petitioner, as trustee, was carrying on a trade or business within the meaning of the statute. This question has received our attention many times, and of course it depends largely upon the situation in the particular case, being considered. Petitioner urges similarity particularly to *John H. Watson, Jr., et al., Trustees*, 35 B. T. A. 706, while respondent points out especially *George Vanderbilt Trust*, 36 B. T. A. 967. In the former case facts are summarized in the statement that "The estate was large and the peti-

Findings of Fact and Opinion.

tioners were given wide powers of management, control, sale and reinvestment of the trust corpus", in addition to the statement that the gross income was \$762,640.85, all of which, except \$56,018.64, was interest on Federal and state obligations, exempt from income tax. Question as to whether the trustees were carrying on a business under section 23 (a) of the Revenue Act of 1932 apparently was not an issue in the case until raised in respondent's brief. We held that commissions allowed by the probate court to the trustees for services performed in the management of the trust estate were expenses incurred in carrying on trade or business. In *George Vanderbilt Trust, supra*, the trustees paid attorneys' fees and claimed deduction under section 23 (a) of the Revenue Act of 1928 as ordinary and necessary expenses incurred in carrying on a trade or business. The only facts appearing were that by the will executors were appointed with power to invest and reinvest the principal, to collect the income, to pay taxes and expenses, and to distribute to beneficiaries, but how these powers were exercised did not appear, except as to the distributions. Taking the view that the trustees may have been mere passive conservators of an investment trust, we held that carrying on a trade or business had not been shown.

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Here, the trust instrument confers powers not dissimilar to those involved in *George Vanderbilt Trust, supra*, but we think with some limitations of importance to a decision of the question at hand; for here there is distributed to the trustee for each trust one-fourth of the testator's residuary estate for purposes in effect as follows: To collect and receive the income, revenues and profits, and to pay, apply, and distribute same to and for the support, education, and maintenance of the beneficiary for life and, after his death, per capita for the support, education, and maintenance of his lineal descendants, payments, applications, and distributions during minority to be within the uncontrolled dis-

111

Findings of Fact and Opinion.

112 cretion of the trustee. It is specifically provided that the trustee shall have the power "to hold, manage and invest, and from time to time as need be, to re-invest the properties held in said Trust for the benefit and advantage of the beneficiaries thereof in such good and productive stocks, bonds or mortgages as will produce, if possible, a sure and regular income." Any investments made by the testator may be retained without liability for loss or shrinkage, or the trustee may change the property into other property as it deems best, with power to sell, exchange, etc., and invest the proceeds in any property it thinks best, but the testator charges the trustee "to be more careful as to the security of the funds than as to the acquisition of higher rates of interest, my desire being to have my property prudently and securely managed rather than hazarded in what may promise great gains."

113 — We conclude from the above language that investment and reinvestment, though within the discretion of the trustee, must be limited to "stocks, bonds or mortgages as will produce, if possible, a sure and regular income." In fact, the record is plain that this is what was done. The increase reported by the trustee for the period from February 26, 1926, to December 31, 1929, differs only \$55 in the two trusts (one reporting \$21,635.44 and the other \$21,580.44), indicating that the two trusts were handled almost exactly the same, and the same conclusion is drawn from the fact that there is less than \$1,000 difference (out of approximately \$963,000) in the amount of income received in the two estates during the time covered by the report and from the fact that there is a difference of only about \$8 in the amount of expenses chargeable against principal out of approximately \$12,800 of such expenses in each estate, while the expenses chargeable against income in the two estates varied only about \$200 out of approximately \$29,000 each. It is apparent that these estates were handled by the trustee in a routine manner. Moreover, it is stipu-

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Findings of Fact and Opinion.

lated that the gross income of both trusts, approximately \$126,000 in the case of each, was entirely from interest and dividends for the year 1931 and the report filed by the trustee for the period from February 26, 1926, to December 31, 1929, shows that, out of \$29,608.74 of expenses chargeable against income, only \$1 was expense of anything other than payment of taxes, state or Federal, and \$2.50 for notary fees. One dollar was for cost of Federal and state stamps for transfer of 250 rights of Marland Oil Co. In the other estate, exactly the same situation is shown. Out of \$29,815.82 expense chargeable against income, \$1 was spent for Federal stamps on the transfer of 250 rights of Marland Oil Co., \$2.50 for notary fees, and the rest was expense of state or Federal taxes. Income tax reports for 1931 ask (in addition to taxes) only \$5.50 as to the one trust, and \$6.11 as to the other, under the heading of deductions. In other words, those are the amounts of expenses incurred by the two estates in those years which could possibly be classed as expense of business; while reference to the ledgers kept by the two estates reflecting income and expense throughout the year 1931 indicates only a very few dollars of expense, and most of this for small items of a few cents each for collection charges on coupons. In the estate of Angier B. Duke, Jr., the total expense shown by the ledger for the year (except \$30.52 taxed in the surrogate's decree) is \$27.95, all of which is shown to be the cost of Federal stamps, mailing bonds, and collection of coupons. The same is true in the trust for Anthony Newton Duke, where we find (except for \$30.53 taxed in the surrogate's decree) a total of \$28.74, all of which consists of small items of Federal stamps, cost of mailing bonds and coupon collection charges. Moreover, as above seen, the report of the trustees for the period from February 26, 1926, to December 31, 1929, demonstrates only one transaction in each estate—the transfer of 250 rights in Marland Oil Co., and the report for 1931 for one trust

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— Findings of Fact and Opinion.

118 shows an income of \$126,729.09, and a loss on sale of securities of \$872.61 from nine sales of securities, seven of which were purchased in 1926, and two in 1928, with a total sale price of \$86,670.38; while the other trust reports an income of \$126,460.28, and a loss of \$1,295.06 from sale of twelve securities, all but one purchased in 1926, the other in 1928, with a total sale price of \$90,430.42. Plainly, securities were being held, not dealt in.

The above facts demonstrate conclusively to us that this is a case of passive investment and not of carrying on a business, for not only is the trustee limited in its investments, but it is cautioned in effect to be a safe investor rather than a participant in trade or business, and, plainly carrying out the testator's injunctions, it conducts no business, because it has, as above seen, no expenses of conducting business other than the collection of coupons and mailing bonds, amounting to a few dollars, and an even more negligible amount for transfer stamps or notary fees. In *George Vanderbilt Trust, supra*, there was no evidence to convince us of business done or trade carried on; here the evidence is pointed and positive that, practically speaking, the only activity of the trust was to watch investments and collect coupons. In *John H. Watson, Jr., et al., Trustees, supra*, the trustees had "wide powers" of management and investment as contrasted with the narrow powers herein, and the present question apparently arose only when brief was filed by respondent. We do not think that case decisive of the issue which arises from the evidence herein. Extensive authority need not be compiled to demonstrate that a mere passive investor, collecting interest and clipping coupons, and making a very few reinvestments, is not engaged in trade or business. *Alice G. Kales*, 34 B. T. A. 1046; *Helen W. Heilbroner*, 34 B. T. A. 1200. That situation here affirmatively appears, as well as the limitations indicated by the trustor, amounting to a direction to trustee to be passive investor rather than to engage in trade or business.

Findings of Fact and Opinion.

In *Estate of Hetty H. R. Green*, 27 B. T. A. 1195, trustees under a testamentary trust had power to rent, lease, sell, or convey real estate, to invest and keep invested the proceeds of the property, to change investments, and to manage and control the trust estate and exercise all powers necessary to that end. The income received during one of the taxable years was derived from 75 capital transactions, 71 of which consisted in receiving money paid for redemption of bonds at maturity, and the other 4 comprising sales of 1 lot of stock, 2 mortgages and a parcel of land. Whenever property was acquired it was taken as an investment, never for the speculative purpose of deriving profit from a sale thereof later on. We commented that, with certain exceptions, the net income of a trust shall be computed in the same manner as that of an individual and that petitioner was not engaged in buying and selling real estate and securities with a view to profit on the transaction, that out of 75 capital transactions only 4 were other than reception of money to redeem bonds at maturity, and that they were occasional, isolated transactions, not a business regularly carried on. We further noted that the language employed by the testatrix to safeguard the trustee property clearly indicated that the purpose was to conserve the estate corpus and to protect it from the hazards of active business enterprise. "The whole tenor of the instrument distinctly negatives any idea that the estate should regularly carry on a business for profit, and the evidence shows, we think, that none was carried on." We therefore concluded and held that net loss deductions were properly disallowed. The very few transactions shown by the record in the instant proceeding are of the same nature as those considered in the cited proceeding and our comment upon the language of the testatrix indicating a purpose to conserve the estate, rather than carry on a business for profit, can be precisely applied to the settlor's language in the trusts here at hand.

121

122

123

Findings of Fact and Opinion.

124 We therefore hold that the trustee in the case of each trust here involved was not carrying on any trade or business, and that the expenses, viz., trustee's commissions paid from principal, sought to be deducted as ordinary and necessary expense of carrying on trade or business under section 23 (a) of the Revenue Act of 1928, were properly denied by the respondent. This conclusion makes it unnecessary to pass upon the other question presented as to whether the fact that the commissions in question were charged to corpus of the trust, under the Surrogate's order, prevents their classification as business expense.

Reviewed by the Board.

125

Decision will be entered under Rule 50.

VAN FOSSAN and ARNOLD dissent.

126

MELLOTT, concurring: Although agreeing with the majority, that the petitioners were not engaged in a trade or business, I am of the opinion that, even if they were, the particular commissions in issue are not deductible. They were paid by the petitioners to themselves in 1931 out of trust corpus, and apparently were never considered by them as deductible items until after substantial deficiencies had been determined against them, the correctness of which they now concede. They had been allowed under section 285 of the Surrogate's Court Act of New York on the basis of *principal* received and paid out. They were nonrecurring items, chargeable to and deductible from corpus. If application had been made by them to the Surrogate's Court in 1926, when the corpus was paid over to them, they would have been entitled to have received at least 50 percent of the commissions at that time; *In Re Bushe*, 227 N. Y. 85, for, under the construction by the New York courts of the section under which the allowances were made,

Findings of Fact and Opinion.

they became entitled to that portion of the allowances immediately upon receipt of the property. 127

In my opinion the commissions in controversy could not be said to be "ordinary and necessary expenses paid * * * in carrying on any trade or business" even if the petitioners were engaged in a trade or business.

SMITH, TURNER, and HARRON concur in the above.

LEECH, dissenting: The respondent admittedly allowed deductions of commissions, similar to those now contested, in his determination of the present deficiencies. He asks for no increased deficiencies because of error in that action. But if that was right, it would seem so, only, if the petitioning bank, as trustee of each of the two trusts, was carrying on business during the taxable year. However, respondent disallows the deduction of similar additional commissions which are now in controversy, because, he says, the bank, as such trustee, was not carrying on business. In my judgment, his position is wholly inconsistent. Either the petitioning bank, as trustee for these trusts, was carrying on business during the taxable year, or it was not. If it was, not only those commissions, the deduction of which was allowed by the respondent, are deductible, but the contested additional commissions are likewise deductible. I think the bank, as such trustee, was more than a passive conservator of investments and was carrying on business during the taxable year. The record, to me, clearly establishes that fact. In my opinion, the additional commissions, now in dispute, are deductible as well as those the deduction of which respondent has allowed and is not now contesting. 128 129

ARUNDELL and TYSON agree with this dissent.

(Seal)

130

**Order Denying Motion for Reopening and
Reconsideration.**

**UNITED STATES BOARD OF TAX APPEALS,
WASHINGTON.**

Docket Nos. 76031, 76046.

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the Benefit of Anthony Newton Duke,**

131

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the Benefit of Angier B. Duke, Jr.,**
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioner having filed motion for reopening and reconsideration in the above proceedings, and said motion and memorandum in support thereof having been carefully considered, it is

132

ORDERED: That said motion be and the same is hereby denied. *Kane (formerly Heilbroner) v. Commissioner*, 100 Fed. (2d) 382.

R. L. DISNEY,
Member.

Dated: Washington, D. C., February 16, 1939.

Decision.

133

**UNITED STATES BOARD OF TAX APPEALS,
WASHINGTON.****Docket No. 76031.**

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the Benefit of Anthony Newton Duke,**
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

134

Pursuant to the findings of fact and opinion of the Board, promulgated January 4, 1939, the respondent on January 25, 1939, filed notice and computation under Rule 50. Copy of said notice and computation having been served on the petitioner, together with notice of hearing, and the proceeding having been called for settlement from the Day Calendar of March 15, 1939, at which time no objection to the proposed computation was offered, it is

ORDERED AND DECIDED: That there is a deficiency in income tax for the year 1931 in the amount of \$2,202.51.

135

Enter:

R. L. DISNEY,
Member.
(Seal)

Decision.

136

**UNITED STATES BOARD OF TAX APPEALS,
WASHINGTON.**

Docket No. 76046.

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the Benefit of Angier B. Duke, Jr.,
Petitioner,**

v.

137

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

Pursuant to the findings of fact and opinion of the Board, promulgated January 4, 1939, the respondent on January 25, 1939, filed notice and computation under Rule 50. Copy of said notice and computation having been served on the petitioner, together with notice of hearing, and the proceeding having been called for settlement from the Day Calendar of March 15, 1939, at which time no objection to the proposed computation was offered, it is

138

ORDERED AND DECIDED: That there is a deficiency in income tax for the year 1931 in the amount of \$2,199.01.

Enter:

**R. L. DISNEY,
Member.
(Seal)**

Petition for Review.

139

**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS,**

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 76031.

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the Benefit of Anthony Newton Duke,**
Petitioner,

—against—

140

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

*To the Honorable Judges of the United States Circuit
Court of Appeals for the Second Circuit:*

The petition of City Bank Farmers Trust Company, as trustee of a trust under the last will and testament of Angier B. Duke, deceased, for the benefit of Anthony Newton Duke, respectfully shows:

141

I.

The said City Bank Farmers Trust Company is a corporation duly organized and engaged in the business of a trust company under the laws of the State of New York, has its principal office and place of business at No. 22 William Street, New York, N. Y., and was formerly known as The Farmers' Loan and Trust Company. The said Angier B. Duke died on September 3, 1923, a resident of the City, County and State of New York, leaving a last will and

Petition for Review.

142 testament in and by Subdivision (d) of Item IX of which he created the trust referred to herein for the benefit of the testator's son, Anthony Newton Duke, and whereby he appointed the said City Bank Farmers Trust Company as trustee. The said will was duly admitted to probate by the Surrogate's Court of New York County, New York, on September 18, 1923, and the said City Bank Farmers Trust Company duly qualified as trustee under said will on or about said date and since said date has been and is now the duly appointed, qualified and acting trustee under said last will and testament and of said trust.

143 The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States.

The Federal income tax return of the petitioner for the calendar year 1931, the year in controversy, was duly filed by the petitioner with the United States Collector of Internal Revenue for the Second District of New York, Custom House, New York, N. Y., the collector in whose district is located the principal office and place of business of the petitioner. The court in which the review of this proceeding is sought is the Circuit Court of Appeals for the Second Circuit, the circuit in which is located the office of said collector.

144

II.

The nature of the controversy is as follows:

Pursuant to a decree of the Surrogate's Court of New York County, New York, entered on January 2, 1931, the petitioner, on January 20, 1931, paid to itself from the funds of said trust the sum of \$38,641.71, computed on the basis of principal in accordance with Section 285 of the Surrogate's Court Act of New York, to which it was entitled for its commissions as trustee of said trust.

Petition for Review.

The petitioner duly prepared and filed its Federal income tax return for the calendar year 1931, as required by the Federal Revenue Act of 1928, on which return no deduction was claimed on account of said commissions. Thereafter and on March 7, 1934, the respondent issued a notice of deficiency determining a deficiency of \$2,202.51 in the Federal income tax of the petitioner for the year 1931, which deficiency was based on a ground not material here. The petitioner on May 4, 1934, filed a petition with the United States Board of Tax Appeals, appealing from such determination, and claimed therein the right, pursuant to the provisions of Section 28(a) of the Revenue Act of 1928, to deduct as a business expense in computing its net income, the amount so paid from the funds of said trust for trustee's commissions. In said petition the petitioner claimed a refund of \$7,986.96 in its tax for said year, which refund was based on said deduction. 145

On motion duly made by the petitioner and granted by the Board on April 26, 1938, the proceeding so instituted by the filing of said petition was consolidated with a proceeding instituted by City Bank Farmers Trust Company, as trustee of a trust under the last will and testament of Angier B. Duke, deceased, for the benefit of Angier B. Duke, Jr., Board of Tax Appeals Docket No. 76046, involving a similar issue, and on said date said proceedings were submitted to the Board on the pleadings, a stipulation of facts, the testimony of a witness and certain documentary evidence. On January 4, 1939, the Board rendered its findings of fact and opinion in said proceedings, in which it was held that said deduction was not allowable on the ground that the petitioner was not carrying on any trade or business. Five members of the Board dissented from said holding. 146

The petitioner on February 3, 1939, filed with the Board a motion for a rehearing and reconsideration of said case, and said motion was denied by an order of the Board 147

Petition for Review.

148 entered on February 16, 1939. The Board on March 23, 1939, entered its decision in said case and determined that there is a deficiency of \$2,202.51 in the Federal income tax of the petitioner for the year 1931.

III.

The petitioner, as a basis for such a review, makes the following assignment of errors committed by the United States Board of Tax Appeals:

149 1. The Board erred in finding and holding that the petitioner during the year 1931 was not carrying on a trade or business within the meaning of Section 23(a) of the Revenue Act of 1928, and in failing and refusing to find and hold that it was carrying on such trade or business during said year.

150 2. The Board erred in holding that, in computing the petitioner's net income for the year 1931, the said sum of \$38,641.71, which was paid from the funds of said trust for trustee's commissions, is not deductible under Section 23(a) of the Revenue Act of 1928 as an ordinary and necessary expense paid or incurred during the taxable year in carrying on the trade or business of the petitioner, and in failing and refusing to hold that said amount is so deductible.

3. The Board erred in disallowing said deduction for trustee's commissions on the ground that the petitioner during the year 1931 was not carrying on a trade or business within the meaning of Section 23(a) of the Revenue Act of 1928, after counsel for the respondent at the hearing of said case had conceded on the record that the petitioner was carrying on such trade or business during said year.

Petition for Review.

4. The Board erred in denying the petitioner's motion for a rehearing and reconsideration of said case, and in failing and refusing to grant said motion. 151

5. The Board erred in determining that there is a deficiency of \$2,202.51 or any other amount in the Federal income tax of the petitioner for the year 1931, and in failing and refusing to hold that there is no deficiency in such tax.

6. The Board erred in failing and refusing to hold that there is an overpayment of \$7,986.96 in the Federal income tax of the petitioner for the year 1931.

152

WHEREFORE, the petitioner prays that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and rules of said court and transmitted to the Clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

ROLLIN BROWNE,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y.

153

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,
Of Counsel.

Petition for Review.

154 State of New York,
County of New York—ss.:

GEORGE CRAVEN, being duly sworn, deposes and says that he is one of the attorneys and counsel of record for the petitioner in the above entitled case; that as such attorney and counsel he is duly authorized to verify the petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decisions of the United States Board of Tax Appeals in the proceeding described in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the facts set forth therein are true to the best of his knowledge, information and belief.

155

GEORGE CRAVEN.

Subscribed and sworn to before me this
21st day of June, 1939.

THOMAS I. FITZGERALD,
Notary Public.

N. Y. Co. Clk's No. 117; Reg. No. 1F349.

Kings Co. Clk's No. 45; Reg. No. 1218.

My Commission expires March 30, 1941.

(Seal)

156

Notice of Filing of Petition for Review.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, 157

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 76031.

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a Trust
Under the Last Will and Testament of Angier B. Duke,
Deceased, for the Benefit of Anthony Newton Duke,
Petitioner,**

—against—

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.** 158

To the Commissioner of Internal Revenue:

YOU ARE HEREBY NOTIFIED that City Bank Farmers Trust Company, as trustee of a trust under the last will and testament of Angier B. Duke, deceased, for the benefit of Anthony Newton Duke, did on the 22nd day of June, 1939 file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board of Tax Appeals heretofore entered in the above entitled case. A copy of the petition for review, together with the assignment of errors as filed, 159 is attached hereto and served upon you herewith.

Dated this 22nd day of June, 1939.

**ROLLIN BROWNE,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y.**

**MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,
Of Counsel.**

Petition for Review.

160 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 22nd day of June, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Petition for Review.

161 IN THE UNITED STATES CIRCUIT COURT OF
APPEALS,

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 76046.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of Angier
B. Duke, Deceased, for the Benefit of Angier B. Duke,
Jr.,

Petitioner,

—against—

162

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

*To the Honorable Judges of the United States Circuit
Court of Appeals for the Second Circuit:*

The petition of City Bank Farmers Trust Company, as trustee of a trust under the last will and testament of

Petition for Review.

Angier B. Duke, deceased, for the benefit of Angier B. Duke, Jr., respectfully shows: 163

I.

The said City Bank Farmers Trust Company is a corporation duly organized and engaged in the business of a trust company under the laws of the State of New York, has its principal office and place of business at No. 22 William Street, New York, N. Y., and was formerly known as The Farmers' Loan and Trust Company. The said Angier B. Duke died on September 3, 1923, a resident of the City, County and State of New York, leaving a last will and testament in and by Subdivision (c) of Item IX of which he created the trust referred to herein for the benefit of the testator's son, Angier B. Duke, Jr., and whereby he appointed the said City Bank Farmers Trust Company as trustee. The said will was duly admitted to probate by the Surrogate's Court of New York County, New York, on September 18, 1923, and the said City Bank Farmers Trust Company duly qualified as trustee under said will on or about said date and since said date has been and is now the duly appointed, qualified and acting trustee under said last will and testament and of said trust. 164

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws, of the United States. 165

The Federal income tax return of the petitioner for the calendar year 1931, the year in controversy, was duly filed by the petitioner with the United States Collector of Internal Revenue for the Second District of New York, Custom House, New York, N. Y., the collector in whose district is located the principal office and place of business of the petitioner. The court in which the review of this proceeding is sought is the Circuit Court of Appeals for the

Petition for Review.

166 Second Circuit, the circuit in which is located the office of said collector.

II.

The nature of the controversy is as follows:

Pursuant to a decree of the Surrogate's Court of New York County, New York, entered on January 2, 1931, the petitioner on January 20, 1931, paid to itself from the funds of said trust the sum of \$38,641.06 computed on the basis of principal in accordance with Section 285 of the Surrogate's Court Act of New York, to which it was entitled for its commissions as trustee of said trust.

167 The petitioner duly prepared and filed its Federal income tax return for the calendar year 1931, as required by the Federal Revenue Act of 1928, on which return no deduction was claimed on account of said commissions. Thereafter and on March 7, 1934, the respondent issued a notice of deficiency determining a deficiency of \$2,199.01 in the Federal income tax of the petitioner for the year 1931, which deficiency was based on a ground not material here. The petitioner on May 4, 1934, filed a petition with the United States Board of Tax Appeals, appealing from such determination, and claimed therein the right, pursuant to the provisions of Section 23 (a) of the Revenue Act of 1928, to deduct as a business expense in computing its net income, the amount so paid from the funds of said trust for trustee's commissions. In said petition the petitioner claimed a refund of \$7,994.56 in its tax for said year, which refund was based on said deduction.

168 On motion duly made by the petitioner and granted by the Board on April 26, 1938, the proceeding so instituted by the filing of said petition was consolidated with a proceeding instituted by City Bank Farmers Trust Company, as Trustee of a Trust under the Last Will and Testament of Angier B. Duke, deceased, for the benefit of Anthony

Petition for Review.

Newton Duke, Board of Tax Appeals Docket No. 76031, 169
involving a similar issue, and on said date said proceedings were submitted to the Board on the pleadings, a stipulation of facts, the testimony of a witness and certain documentary evidence. On January 4, 1939, the Board rendered its findings of fact and opinion in said proceedings, in which it was held that said deduction was not allowable on the ground that the petitioner was not carrying on any trade or business. Five members of the Board dissented from said holding.

The petitioner on February 3, 1939, filed with the Board a motion for a rehearing and reconsideration of said case, and said motion was denied by an order of the Board entered on February 16, 1939. The Board on March 23, 1939, 170
entered its decision in said case and determined that there is a deficiency of \$2,199.01 in the Federal income tax of said petitioner for the year 1931.

III.

The petitioner, as a basis for such a review, makes the following assignment of errors committed by the United States Board of Tax Appeals:

1. The Board erred in finding and holding that the petitioner during the year 1931 was not carrying on a trade or business within the meaning of Section 23(a) of the Revenue Act of 1928, and in failing and refusing to find and hold that it was carrying on such trade or business during said year. 171

2. The Board erred in holding that in computing the petitioner's net income for the year 1931 the said sum of \$38,641.06, which was paid from the funds of said trust for trustee's commissions, is not deductible under Section 23(a) of the Revenue Act of 1928 as an ordinary and necessary expense paid or incurred during the taxable year

Petition for Review.

172 in carrying on the trade or business of the petitioner, and
1 in failing and refusing to hold that said amount is so deductible.

3. The Board erred in disallowing said deduction for trustee's commissions on the ground that the petitioner during the year 1931 was not carrying on a trade or business within the meaning of Section 23(a) of the Revenue Act of 1928, after counsel for the respondent at the hearing of said case had conceded on the record that the petitioner was carrying on such trade or business during said year.

173 4. The Board erred in denying the petitioner's motion
for a rehearing and reconsideration of said case, and in failing and refusing to grant said motion.

5. The Board erred in determining that there is a deficiency of \$2,199.01 or any other amount in the Federal income tax of the petitioner for the year 1931, and in failing and refusing to hold that there is no deficiency in such tax.

6. The Board erred in failing and refusing to hold that there is an overpayment of \$7,994.56 in the Federal income tax of the petitioner for the year 1931.

174 WHEREFORE, the petitioner prays that the decision of
the United States Board of Tax Appeals be reviewed by the
United States Circuit Court of Appeals for the Second
Circuit; that a transcript of the record be prepared in accordance with the law and rules of said court and transmitted to the Clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

ROLLIN BROWNE,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y.

Petition for Review.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,
Of Counsel.

175

State of New York,
County of New York—ss.:

GEORGE CRAVEN, being duly sworn, deposes and says that he is one of the attorneys and counsel of record for the petitioner in the above entitled case; that as such attorney and counsel he is duly authorized to verify the petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decisions of the United States Board of Tax Appeals in the proceeding described in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the facts set forth therein are true to the best of his knowledge, information and belief.

176

GEORGE CRAVEN.

Subscribed and sworn to before me this
21st day of June, 1939.

177

THOMAS I. FITZGERALD,
Notary Public.

N. Y. Co. Clk's No. 117, Reg. No. 1F349.
Kings Co. Clk's No. 45; Reg. No. 1218.
My Commission expires March 30, 1941.

(Seal)

178

Notice of Filing of Petition for Review.**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS,****FOR THE SECOND CIRCUIT.****Board of Tax Appeals, Docket No. 76046.**

179

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of Angier
B. Duke, Deceased, for the Benefit of Angier B.
Duke, Jr.,**

Petitioner,**—against—****COMMISSIONER OF INTERNAL REVENUE,****Respondent.**

To the Commissioner of Internal Revenue:

180

YOU ARE HEREBY NOTIFIED that City Bank Farmers Trust Company, as trustee of a trust under the last will and testament of Angier B. Duke, deceased, for the benefit of Angier B. Duke, Jr., did on the 22nd day of June, 1939 file with the Clerk of the United States Board of Tax Appeals at Washington, D. C. a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board of Tax Appeals heretofore entered in the above entitled case. A copy of the petition for re-

Notice of Filing of Petition for Review.

view, together with the assignment of errors as filed, is attached hereto and served upon you herewith. 181

Dated this 22nd day of June, 1939.

ROLLIN BROWNE,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,
Of Counsel.

182

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 22nd day of June, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

183

184

Stipulation for Consolidation of Cases.

**IN THE UNITED STATES CIRCUIT COURT OF
APPEALS,**

FOR THE SECOND CIRCUIT.

B. T. A., Docket No. 76031.

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a Trust
Under the Last Will and Testament of Angier B. Duke,
Deceased, for the Benefit of Anthony Newton Duke,**
Petitioner,

185

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

B. T. A., Docket No. 76046.

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a Trust
Under the Last Will and Testament of Angier B. Duke,
Deceased, for the Benefit of Angier B. Duke, Jr.,**
Petitioner,

—against—

186

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

IT IS STIPULATED AND AGREED between the parties to the above-entitled cases, which were consolidated for hearing and opinion by the United States Board of Tax Appeals and in which petitions for review by the United States Circuit Court of Appeals for the Second Circuit were filed on June 22, 1939, that because the issue is the same in both cases, said cases may be consolidated for preparation of the

Stipulation for Consolidation of Cases.

record to be filed with the United States Circuit Court of Appeals for the Second Circuit and for hearing by said Court, and that one consolidated record of the proceedings in both cases in the United States Board of Tax Appeals may be filed with said Court. 187

Dated, August 14, 1939.

GEORGE CRAVEN,
Counsel for Petitioners.

J. P. WENCHEL,
Chief Counsel for Bureau of Internal Revenue,
Counsel for Respondent. 188

So ordered.

AUGUSTUS N. HAND,
United States Circuit Judge.

August 21, 1939.

Stipulation of Facts.

190

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 76031.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a Trust
Under the Last Will and Testament of Angier B.
Duke, Deceased, for the Benefit of Anthony Newton
Duke,

Petitioner,

—against—

191

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 76046.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a Trust
Under the Last Will and Testament of Angier B.
Duke, Deceased, for the Benefit of Angier B. Duke, Jr.,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

192

Respondent.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled proceedings, which have been consolidated for hearing by order of the Board of Tax Appeals, by their respective counsel, that the following facts may be taken as true and that the exhibits referred to herein may be admitted and received in evidence without the production of the originals, with the reservation that this stipulation shall be without prejudice to the right of

Stipulation of Facts.

either party to introduce further evidence not inconsistent 193
with the facts herein stipulated, viz.:

1. City Bank Farmers Trust Company is a corporation duly organized and operating under the laws of the State of New York, and at all times referred to herein was duly engaged in the business of a trust company under the provisions of the banking laws of the State of New York with its principal place of business at 22 William Street, New York, New York. The said City Bank Farmers Trust Company was formerly known as The Farmers' Loan and Trust Company.

2. Angier B. Duke died on September 3, 1923, a resident 194
of the City, County and State of New York, leaving a last will and testament in which he appointed City Bank Farmers Trust Company as trustee. The said last will and testament was duly admitted to probate by the Surrogate's Court of New York County, New York, to which jurisdiction in that behalf belonged, on September 18, 1923, and on or about said date the said City Bank Farmers Trust Company duly qualified as trustee under said will. The said City Bank Farmers Trust Company since said date has been and is now the duly appointed, qualified and acting trustee under the last will and testament of the said Angier B. Duke, deceased.

195

3. In and by subdivisions (c) and (d) of ITEM IX of said will the said testator, Angier B. Duke, created the two trusts hereinafter referred to, one for the benefit of the testator's son Angier B. Duke, Jr., and one for the benefit of the testator's son Anthony Newton Duke. A true copy of the last will and testament of Angier B. Duke is annexed hereto, marked "Exhibit A", and made a part hereof.

4. In a proceeding which was instituted by the petitioner for the settlement of its account as trustee under

Stipulation of Facts.

- 196 subdivisions (c) and (d) of ITEM IX of the last will and testament of Angier B. Duke, deceased, a decree was entered on January 2, 1931, by the Surrogate's Court of New York County, New York, to which jurisdiction in that behalf belonged, judicially settling the account of the petitioner as said trustee. It was provided in said decree that the petitioner retain and pay to itself out of the balance of principal remaining in its hands, as found by the court, the sum of \$38,641.71 as and for the commissions to which it was entitled under subdivision (d) of ITEM IX of said will for the benefit of Anthony Newton Duke, which said commissions were computed pursuant to the provisions of Section 285 of the Surrogate's Court Act of the State of New York on the basis of \$3,844,663.23 of principal received and \$12,806.75 of principal paid out by the petitioner as trustee of said trust. It was provided further in said decree that the petitioner retain and pay to itself out of the balance of principal remaining in its hands, as found by the court, the sum of \$38,641.06 as and for its commissions to which it was entitled under subdivision (c) of ITEM IX of said will for the benefit of Angier B. Duke, Jr., which said commissions were computed pursuant to the provisions of Section 285 of the Surrogate's Court Act of the State of New York on the basis of \$3,844,608.23 of principal received and \$12,798.62 of principal paid out by the petitioner as trustee of said trust. A true copy of said decree, together with Schedules F, G and H of the account in the case of each of said trusts, is annexed hereto, marked "Exhibit B", and made a part hereof.
- 197
- 198

5. Pursuant to the provisions of said decree the petitioner as trustee of said trusts, on January 20, 1931, paid to itself out of the principal funds of said trust for the benefit of Anthony Newton Duke the sum of \$38,641.71, as and for such commissions, and on said date paid to itself out of the principal funds of said trust for the benefit of

Stipulation of Facts.

Angier B. Duke, Jr., the sum of \$38,641.06, as and for such commissions. 199

6. The said Anthony Newton Duke and the said Angier B. Duke, Jr., the respective beneficiaries of the said two trusts under subdivision (d) and subdivision (c) of ITEM IX of said will, at all times referred to herein were living and were under the age of twenty-one, and the said trusts were in full force and effect during all such times.

7. The gross taxable income for the year 1931 of the said trust under subdivision (d) of ITEM IX of said will for the benefit of Anthony Newton Duke was as follows: 200

| | |
|--|--------------------|
| Fully taxable interest | \$ 523.83 |
| Interest on tax-free covenant bonds | 100.00 |
| Loss on sale of securities | 872.61 |
| Domestic dividends | 109,443.90 |
| Foreign dividends | 17,533.97 |
| Total | <hr/> \$126,729.09 |

The said trust had deductions for said year, other than the deduction, if any, to which it may be entitled for the aforesaid trustee's commissions and other than the deduction to which it is entitled for income distributed to the minor beneficiary, of \$5,209.46. The petitioner as trustee of said trust, pursuant to the provisions of subdivision (d) of ITEM IX of said will, distributed \$6,281.98 out of such gross income in the year 1931 to the said Anthony Newton Duke, the minor beneficiary of said trust, leaving net undistributed income of \$115,237.65, arrived at by taking said deductions, to be distributed to said beneficiary when he should reach the age of twenty-one. The petitioner on its books of account, pursuant to said order and decree of the court, Exhibit B hereto, deducted the aforesaid trus-

Stipulation of Facts.

202 tee's commissions in the sum of \$38,641.71 from the principal of the trust; and if said sum is allowable as a deduction from taxable income in this proceeding, it is to be deducted from said net income of \$115,237.65, arrived at as aforesaid, in determining the taxable net income of said trust for the year 1931.

8. The gross taxable income for the year 1931 of the said trust under subdivision (c) of ITEM IX of said will for the benefit of Angier B. Duke, Jr., was as follows:

| | | |
|-----|--|--------------------|
| | Fully taxable interest | \$ 682.47 |
| 203 | Interest on tax-free covenant bonds | 100.00 |
| | Loss on sale of securities | 1,295.06 |
| | Domestic dividends | 109,438.90 |
| | Foreign dividends | 17,533.97 |
| | Total | <hr/> \$126,460.28 |

204 The said trust had deductions for said year, other than the deduction, if any, to which it may be entitled for the aforesaid trustee's commissions and other than the deduction, to which it is entitled for income distributed to the minor beneficiary, of \$5,217.99. The petitioner as trustee of said trust, pursuant to the provisions of subdivision (c) of ITEM IX of said will, distributed \$6,267.49 out of such gross income in the year 1931 to the said Angier B. Duke, Jr., the minor beneficiary of said trust, leaving net undistributed income of \$114,974.80, arrived at by taking said deductions, to be distributed to said beneficiary when he should reach the age of twenty-one. The petitioner on its books of account, pursuant to said order and decree of the court, Exhibit B hereto, deducted the aforesaid trustee's commissions in the sum of \$38,641.06 from the principal of the trust; and if said sum is allowable as a deduction from taxable income in this proceeding, it is to

Stipulation of Facts.

be deducted from said net income of \$114,974.80, arrived at as aforesaid in determining the taxable net income of said trust for the year 1931. 205

9. The petitioner as trustee of said trust under subdivision (d) ITEM IX of said will for the benefit of Anthony Newton Duke, duly filed the Federal fiduciary and income tax returns of said trust for the year 1931 on Forms 1041 and 1040 with the Collector of Internal Revenue for the Second District of New York, Custom House, New York, New York, on March 14, 1932. The said return on Form 1040 showed undistributed income of \$119,046.95 taxable to the trustee, and showed a tax liability of \$12,876.28, and the amount of said tax liability of said trust was duly paid by the petitioner to the Collector of Internal Revenue for the Second District of New York, Custom House, New York, New York, as follows: 206

| | |
|--------------------|-------------|
| March 14, 1932 | \$ 3,219.07 |
| June 11, 1932 | \$ 3,219.07 |
| September 13, 1932 | \$ 3,219.07 |
| December 12, 1932 | \$ 3,219.07 |
| Total | \$12,876.28 |

10. The petitioner as trustee of said trust under subdivision (c) of ITEM IX of said will for the benefit of Angier B. Duke, Jr., duly filed the Federal fiduciary and income tax returns of said trust for the year 1931 on Forms 1041 and 1040, with the Collector of Internal Revenue for the Second District of New York, Custom House, New York, New York, on March 14, 1932. The said return on Form 1040 showed undistributed income of \$119,200.80 taxable to the trustee, and showed a tax liability of \$12,866.99, and the amount of said tax liability of said trust was duly paid by the petitioner to the Col- 207

Stipulation of Facts.

208 lector of Internal Revenue for the Second District of New
York, Custom House, New York, New York, as follows:

| | | |
|-----------|----------|--------------------|
| March | 14, 1932 | \$ 3,216.77 |
| June | 11, 1932 | \$ 3,216.74 |
| September | 13, 1932 | \$ 3,216.74 |
| December | 12, 1932 | \$ 3,216.74 |
| Total | | <u>\$12,866.99</u> |

209 11. Included in the said items of net income in the
total amount of \$119,046.95, referred to in paragraph 9
hereof, was the sum of \$16,670.71 received by the peti-
tioner as trustee of said trust for the benefit of Anthony
Newton Duke as dividends from British corporations. In
said return and in the petition filed in these proceedings,
it was contended by the petitioner that such dividends
amounted to \$21,764.42; that from such dividends British
income taxes were deducted and paid at the source in the
sum of \$5,093.71; and that the petitioner was entitled to
a credit of \$2,936.69 and a deduction of the balance of
\$2,157.02 on said return by reason of such taxes alleged
to have been paid to the Kingdom of Great Britain on
such dividends. It is agreed that the petitioner is not
entitled to such credit and deduction and that only the
sum of \$16,670.71, the amount actually received by the
210 petitioner on account of such British dividends, should be
included in the taxable income of the trust on its said
return.

12. Included in the said items of net income in the
total amount of \$119,200.80, referred to in paragraph 10
hereof, was the sum of \$16,673.74 received by the peti-
tioner as trustee of said trust for the benefit of Angier
B. Duke, Jr., as dividends from British corporations. In
said return and in the petition filed in these proceedings,
it was contended by the petitioner that such dividends
amounted to \$21,768.38; that from such dividends British

Stipulation of Facts.

income taxes were deducted and paid at the source in the sum of \$5,094.64; and that the petitioner was entitled to a credit of \$2,930.94 and a deduction of the balance of \$2,163.70 on said return by reason of such taxes alleged to have been paid to the Kingdom of Great Britain on such dividends. It is agreed that the petitioner is not entitled to such credit and deduction and that only the sum of \$16,673.74, the amount actually received by the petitioner on account of such British dividends should be included in the taxable income of the trust on its said return. 211

13. The petitioner did not claim on the said returns filed for the said trust for the benefit of Anthony Newton Duke, or either of them, a deduction for the aforesaid trustee's commissions paid in said year from the funds of said trust, or any part thereof. The petitioner did not claim on said returns filed for the said trust for the benefit of Angier B. Duke, Jr., or either of them, a deduction for the aforesaid trustee's commissions paid in said year from the funds of said trust, or any part thereof. 212

14. The principal of the said two trusts was received by the petitioner as trustee from the executors of the last will and testament of Angier B. Duke, deceased, on February 26, 1926.

15. The petitioner, as trustee of said trusts, at all times referred to herein, including the year 1931, kept its books of account and rendered its Federal income tax returns on the basis of cash receipts and disbursements. 213

Dated, April 26, 1938.

GEORGE H. CRAVEN,
Counsel for Petitioner.

(s) J. P. WENCHEL,
Chief Counsel for
Bureau of Internal Revenue,
Counsel for Respondent.

214 **EXHIBIT A, ANNEXED TO STIPULATION OF
FACTS.**

IN THE NAME OF GOD, AMEN.

I, **ANGIER B. DUKE**, of New York City, New York, being of sound mind and disposing memory, but recognizing the uncertainty of life, do make, publish and declare the following as and for and to be my last Will and Testament, hereby revoking all former Wills and Codicils made by me.

ITEM I. I direct that my body be laid in the family mausoleum in the cemetery at Durham, North Carolina.

215 **ITEM II.** I give and bequeath to Trinity College, of Durham, North Carolina, the sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00) to be added to the Endowment Fund of said college.

ITEM III. I give and bequeath to The Fidelity Bank of Durham, North Carolina, as Trustee for Memorial Methodist Church at Durham, North Carolina, the sum of Ten Thousand Dollars (\$10,000.00), to be held and invested by said Trustee in its discretion as a principal fund, the net income from which shall be paid, as it accrues, to the Treasurer of the said Church, for use in defraying the expenses of said Church.

216

ITEM IV. I give and bequeath unto my beloved sister, **MARY DUKE BIDDLE**, such pearl necklaces and family silver service as may be given me by the will of my mother.

ITEM V. In the event that he acts as Executor of my Will and Estate, I give and bequeath unto my friend **E. BAYARD HALSTED**, the sum of Twenty Thousand Dollars (\$20,000.00); in the event that he acts as Executor of my Will and Estate, I give and bequeath unto my friend **GEORGE G. ALLEN**, the sum of Twenty Thousand Dollars

Exhibit A, Annexed to Stipulation of Facts.

(\$20,000.00); in the event that he acts as Executor of my Will and Estate, I give and bequeath unto my friend JOHN C. THORN, the sum of Twenty Thousand Dollars (\$20,000.00); in the event that he acts as Executor of my Will and Estate, I give and bequeath unto my friend WILLIAM R. PERKINS, the sum of Thirty Thousand Dollars (\$30,000.00). 217

ITEM VI. I give and bequeath to the Methodist Orphanage for white children at Raleigh, North Carolina, by whatever title it may be known, the sum of Ten Thousand Dollars (\$10,000.00), to be added to its Endowment Fund; and to the Methodist Orphanage for white children at Winston-Salem, North Carolina, by whatever title it may be known, the sum of Five Thousand Dollars (\$5,000.00), to be added to its Endowment Fund; to the Oxford Orphan Asylum for white children at Oxford, North Carolina, by whatever title it may be known, the sum of Five Thousand Dollars (\$5,000.00), to be added to its Endowment Fund; to the Orphan Asylum for colored children at Oxford, North Carolina, by whatever title it may be known, the sum of One Thousand Dollars (\$1,000.00), to be added to its Endowment Fund; and to the National Religious Training School at Durham, North Carolina, by whatever title it may be known, the sum of One Thousand Dollars (\$1,000.00), to be added to its Endowment Fund. 218

ITEM VII. I give and bequeath to my butler, ALFRED GARDNER, the sum of Five Hundred Dollars (\$500.00) provided he is in my employ at the time of my death. 219

ITEM VIII. I direct that my Executors, as soon as practicable and in all events within one year after my death, make, or cause to be made by persons selected by them for the purpose, a careful inventory and appraisal of all the property (which shall include all rights, powers and interests in, over and concerning property of every kind and wheresoever situated) which I may own at my

Exhibit A, Annexed to Stipulation of Facts.

220 death, setting forth every item in detail, as far as possible, and appraising each item therein at what is, in their judgment, its then cash value. They shall then add such valuations and thus ascertain the aggregate value of such items. Full and final power is hereby given my Executors to make such inventory and appraisal, and such inventory and appraisal shall take the place of any inventory and appraisal required by law to be made and filed. I hereby adopt such appraisal as the true and real value, singly and in the aggregate, of said property, and of each and every item thereof, and direct that it shall be binding and conclusive for all purposes and upon all persons. All

221 property of whatever kind and wherever situated which the will of my father or the will of my mother either gives me or gives the right to dispose of by my will shall be included in such inventory and appraisal, it being my intention that this and the succeeding provisions of this will shall be an exercise of any such power or disposition by will given me either by the will of my father or the will of my mother, and for this purpose in case either of said wills shall require the disposition of the property to and among my children, such property shall be included as a part of the shares which I hereinafter set apart for such children.

222 ITEM IX. The residue of the property so inventoried and appraised as aforesaid which may remain after satisfying and performing the other items of this will, paying my just debts and defraying the cost, charges and expenses of administering my estate, including therein all taxes legally assessed against the same, hereby denominated my residuary estate, I give, devise and bequeath, and direct my Executors to divide, allot and distribute as follows:

(a) One-Fourth in value of said residuary estate to my mother, SARAH P. DUKE, for her natural life, with remainder absolutely and in fee simple to my said sister,

Exhibit A, Annexed to Stipulation of Facts.

MARY DUKE BIDDLE, but in case my said sister shall die leaving no issue living at the time of her death, then in all respects in accordance with the then statutes of the State of New York governing the descent of real estate to and among those who by said statutes would have inherited any real property then owned by me in said State had I died intestate at the time of the death of my said sister. 223

(b) One-fourth in value of said residuary estate absolutely and in fee simple to my said sister, MARY DUKE BIDDLE; but in case she should die leaving no issue living at her death, then to my mother for her natural life if she be then alive, and at my mother's death or at the death of my sister leaving no issue then living if my mother be not then alive, in all respects in accordance with the then statutes of the State of New York governing the descent of real estate to and among those who by said statutes would have inherited any real property owned by me in said State at the time of such death of my sister or of my mother, as the case may be, had I died intestate at the time of the death of my said sister or of my mother, as the case may be. 224

(c) One-fourth in value of said residuary estate to The Farmers' Loan and Trust Company, in trust, however, for the uses and purposes following: Said Trustee shall collect and receive the income, revenues and profits thereof, and shall pay, apply and distribute the same to and for the support, education and maintenance of my son, ANGIER B. DUKE, JR., so long as he shall live, and after his death per capita in equal portions for the support, education and maintenance of his lineal descendants so long as this Trust may thereafter continue. Such payments, applications and distributions during the minority of my said son, ANGIER B. DUKE, JR., shall be in such amounts and at such times as in the uncontrolled discretion of said Trustee 225

Exhibit A, Annexed to Stipulation of Facts.

226 may be by it deemed necessary and advantageous for such purposes, it being my intention that the Trustee may, in its discretion, withhold from my said son, ANGIER B. DUKE, Jr., during his minority the whole or any part of such income, revenues and profits, and accumulate the same for his benefit. Upon my said son attaining his majority all said accumulations shall be at once paid to him. In case my said son dies before attaining his majority all such accumulations shall become a part of his estate and shall be paid, applied and distributed accordingly. Upon the death of both of my sons, ANGIER B. DUKE, Jr., and ANTHONY NEWTON DUKE, or upon the death of said ANGIER B. DUKE, Jr., and of all his lineal descendants (if such there shall be), whichever shall first occur, this Trust shall terminate, and all the property then held in said Trust, except such accumulations, shall be paid and distributed per capita to and among the lineal descendants of my said son, ANGIER B. DUKE, Jr., then living, and in case there be no such lineal descendants then living, then in all respects in accordance with the statutes of the State of New York governing the descent of real property to and among those who by said statutes would have inherited real property then owned by me in said State had I died intestate at the time of the termination of this Trust.

228 (d) One-fourth in value of said residuary estate to The Farmers' Loan and Trust Company, in trust, however, for the uses and purposes following: Said Trustee shall collect and receive the income, revenues and profits thereof, and shall pay, apply and distribute the same to and for the support, education and maintenance of my son, ANTHONY NEWTON DUKE, so long as he shall live, and after his death per capita in equal portions for the support, education and maintenance of his lineal descendants so long as this Trust may thereafter continue. Such payments, applications and distributions during the minor-

Exhibit A, Annexed to Stipulation of Facts.

ity of my said son, ANTHONY NEWTON DUKE, shall be in 229
 such amounts and at such times as in the uncontrolled
 discretion of said Trustee may be by it deemed necessary
 and advantageous for such purposes, it being my inten-
 tion that the Trustee may, in its discretion, withhold
 from my said son, ANTHONY NEWTON DUKE, during his
 minority the whole or any part of such income, revenues
 and profits, and accumulate the same for his benefit.
 Upon my said son attaining his majority all said accumula-
 tions shall be at once paid to him. In case my said son
 dies before attaining his majority all such accumulations
 shall become a part of his estate and shall be paid, applied
 and distributed accordingly. Upon the death of both of 230
 my sons, ANGIER B. DUKE, Jr., and ANTHONY NEWTON
 DUKE, or upon the death of said ANTHONY NEWTON DUKE
 and of all his lineal descendants (if such there shall be),
 whichever shall first occur, this Trust shall terminate,
 and all the property then held in said Trust, except such
 accumulations, shall be paid and distributed per capita
 to and among the lineal descendants of my said son,
 ANTHONY NEWTON DUKE, then living, and in case there
 be no such lineal descendants then living, then in all
 respects in accordance with the statutes of the State
 of New York governing the descent of real property to
 and among those who by said statutes would have inherited
 real property then owned by me in said State had I died 231
 intestate at the time of the termination of this Trust.

(e) As respects each of the aforesaid Trusts, it is my
 will that:

The said Trustee shall have power to hold, manage and
 invest, and from time to time as need be, to re-invest the
 properties held in said Trust for the benefit and advantage
 of the beneficiaries thereof in such good and productive
 stocks, bonds or mortgages as will produce, if possible, a
 sure and regular income.

Exhibit A, Annexed to Stipulation of Facts.

232

The said Trustee and its successors shall have power to retain any investments made by me in my lifetime without liability for loss or shrinkage, or to change the property received by it under this will into other property as it deems best for the respective beneficiaries, and to that end it shall have power to sell, assign, transfer, exchange, deliver and convey any property at any time, and it shall invest the proceeds of all such sales and exchanges in any property it thinks best; but in all investments I charge it and its successors to be more careful as to the security of the funds than as to the acquisition of higher rates of interest, my desire being to have my property prudently and securely managed rather than hazarded in what may promise great gains.

233

Subject to the other provisions of this will, said Trustee shall pay, apply, divide and distribute such incomes, revenues and profits quarterly, semi-annually or annually, as may in its discretion be found best suited to the due administration of the Trusts.

234

Said Trustee shall have power to pay all taxes, levies and assessments which may be validly imposed upon the Trust Estate, or any part thereof or in respect thereof, or which may be incurred in the exercise of any of the powers conferred by this will, as well as all costs, charges and expenses of administering this Trust, which shall include adequate insurance, necessary repairs, and compensation to the Trustee for its service as such.

In the event that any stock dividend shall be declared upon any of the stock held under this instrument, the said stock received pursuant thereto shall for all purposes be treated and deemed to be principal even if the said stock dividend shall represent earnings. In the event that any rights shall accrue to or be declared in favor of any stock held hereunder, the said rights shall be sold by said Trustee and the proceeds thereof shall for all purposes be treated, considered and deemed as income, revenues and profits.

Exhibit A, Annexed to Stipulation of Facts.

No Trustee hereby appointed, and no Trustee appointed in pursuance of any powers herein contained, shall be required to give any bond or other security for the performance of his or its duty as such Trustee, nor shall any Trustee be required to reserve any part of the income of any investment or security for the purpose of creating a sinking fund to retire or absorb the premium in the case of bonds or other securities taken over, purchased or acquired by the Trustee at a premium. 235

The said Trustee may join in, assent to and make payments under any reorganization plan prepared and presented by or in behalf of committees of security holders, affecting or relating to securities held under the trust estate created herein, and is also hereby empowered to use or apply in its discretion any funds in the principal account, and, if necessary, is empowered to sell sufficient of the securities held hereunder for the purpose of making such payment. 236

It is my wish that said Trustee advise and consult with my Executors and my uncle, Mr. James B. Duke, upon and with reference to the sale, conveyance, exchange, transfer or delivery of any property received by it under this will, or of any investment or reinvestment of funds or money coming into its hands before making the same, to aid but not to control the said Trustee's discretion. 237

ITEM X. I hereby nominate and appoint my friend, E. BAYARD HALSTED, as my successor as Executor of the last Will and Testament of my father and of my mother.

ITEM XI. If any devisee, legatee, or beneficiary near or remote, immediate or contingent, under this will attempts to break this will or to set it aside in whole or in any part or to evade or disregard any part of it he, she or it, shall immediately upon the institution of any suit at law or in equity or of any special proceeding or legal opera-

Exhibit A, Annexed to Stipulation of Facts.

238 tion or litigation, *ipso facto*, lose, forego, surrender and forfeit any devises or bequests made to him, her or it under this will as if he, she or it had not been named or referred to in this will, and as fully as if he or she had never lived or it had never existed.

239 ITEM XII. I nominate, constitute and appoint my friends, E. BAYARD HALSTED, GEORGE G. ALLEN, JOHN C. THORN, and WILLIAM R. PERKINS, to be Executors of this will and of my estate, and direct that none of them be required to give or furnish any bond or security as such Executor, and that all costs and expenses incurred by them in and about performing the duties of Executors, including railroad and other travelling expenses, hotel bills while away from their respective homes on duties of my estate, be borne and paid out of my estate or refunded to them respectively, if they shall have paid any such costs and expenses. In case any bond or security be anywhere required of any of them the cost and charges of procuring and giving same shall be a part of the expense of administering my estate. None of my Executors shall receive any compensation for serving as Executors. A majority of my Executors may act, and their action shall be as binding as if all had acted. Each of my Executors is hereby empowered to name in his will his successor as Executor of this my will.

240 I hereby confer on my Executors full right and power to sell at public or private sale any and all property I may own at my death for such price, on such terms, for such consideration and at such time or times as they may deem to be to the best interest of my estate, to execute and deliver in due and legal form such transfers, conveyances and assignments thereof as may be necessary to vest in the purchasers such title thereto as I may have had at the time of my death and to give receipts, releases and acquittances for each and every payment made and lien taken or reserved. No purchaser shall be required to

Exhibit A, Annexed to Stipulation of Facts.

see to the application of the purchase money. Any legacy 241
 given or bequest made or trust created by this will may
 be satisfied by my Executors wholly or partly in money or
 property, and the judgment and decision of my Executors
 in this respect as well as with respect to the kind, quantity
 and value of the property to be utilized for such purpose
 or in and for the distribution, allotment or division that
 shall be made of my estate shall be final and conclusive
 on all interested parties, my Executors being hereby con-
 stituted the sole arbiters of any and all such questions and
 matters. All the powers conferred upon my Executors
 shall devolve upon and may be fully exercised by the sur-
 vivors or survivor thereof.

IN TESTIMONY WHEREOF, I have subscribed my name and
 affixed my seal unto this, my last Will and Testament, con-
 sisting with this page of nine pages, each page of which,
 except this page, I have identified by signing my name on
 the margin thereof, all on the 26th day of December, 1922.

ANGIER B. DUKE (L. S.)

The foregoing instrument, consisting with this page of
 nine pages, was on this 26th day of December, 1922, signed,
 sealed, published and declared by the above named testator,
 ANGIER B. DUKE, as and for and to be his last Will and
 Testament in the joint presence of us who at his request 243
 and in his presence and in the presence of each other have
 hereunto subscribed our names as witnesses this 26th day
 of December, 1922.

ALEXANDER H. SANDS, JR., residing at 145 Christopher St.,
 Montclair, N. J.

ROBERT A. NORRISS, residing at 440 Riverside
 Drive, New York City.

WILLIAM LEE BALDWIN, residing at 318 West 100th
 Street, New York City.

244 **EXHIBIT B, ANNEXED TO STIPULATION OF FACTS.**

At a Surrogate's Court held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, City, County and State of New York, on the 2nd day of January, 1931.

Present—HON. JOHN P. O'BRIEN, *Surrogate*.

In the Matter

of

245 The judicial settlement of the account of proceedings of CITY BANK FARMERS TRUST COMPANY, formerly known as The Farmers' Loan and Trust Company, as Trustee under Subdivisions "c" and "d" of ITEM IX of the Last Will and Testament of

ANGIER B. DUKE,

Deceased.

246 The City Bank Farmers Trust Company, formerly known as The Farmers' Loan and Trust Company, having heretofore made application to the Surrogate's Court of the County of New York for the judicial settlement of its account as trustee under subdivisions "c" and "d" of ITEM IX of the last will and testament of ANGIER B. DUKE, deceased, and for the construction of subdivision "e" of ITEM IX of said will, and a citation having been thereupon issued pursuant to statute directed to all of the persons interested in the trusts created under subdivisions "c" and "d" of ITEM IX of said will, citing them and each of them to show cause before the Surrogate of the County of New York, at the Hall of Records, in the Borough of Manhattan, City, County and State of New York, on the 19th day of September, 1930, at 10:30 o'clock in the forenoon

Exhibit B, Annexed to Stipulation of Facts.

of that day, why said account should not be judicially
 settled and allowed, and why subdivision "e" of ITEM IX
 of said will should not be construed as prayed for in the
 petition herein, and said citation having been returned
 with proof of due service thereof on the following respondents,
 to wit: Angier B. Duke, Jr., Anthony Newton Duke,
 Cordelia Biddle Robertson as General Guardian of the
 person and estate of Angier B. Duke, Jr. and Anthony
 Newton Duke, Mary Duke Biddle (Mrs. Anthony J. Drexel
 Biddle, Jr.), Mary Duke Biddle and Anthony J. Drexel
 Biddle III, and Sarah P. Duke having duly appeared in the
 above entitled proceeding by Forrest Hyde, Esq., her attorney,
 whose authority in writing to so appear duly executed
 and acknowledged has been filed herein, and said City
 Bank Farmers Trust Company having duly appeared upon
 the return day of said citation by Messrs. Taylor, Blanc,
 Capron & Marsh, its attorneys, and none of the other parties
 to this proceeding having appeared, and William H.
 Hickin, Esq., having been duly appointed Special Guardian
 for the infant respondents Angier B. Duke, Jr., Anthony
 Newton Duke, Mary Duke Biddle and Anthony J. Drexel
 Biddle III, and said City Bank Farmers Trust Company
 having duly rendered an account of its proceedings as
 trustee under subdivisions "c" and "d" of ITEM IX of said
 will from February 26, 1926, to and including December
 31, 1929, under oath before said Surrogate, and said account
 having been duly filed, and said William H. Hickin
 having duly filed his report as Special Guardian herein,
 wherein he finds that said account is in all respects correct
 and true so far as the interests of his wards are concerned,
 and the Court having been asked to construe subdivision
 "e" of ITEM IX of said will, and said will having been
 construed as hereinafter more fully set forth, and said
 matter having been duly adjourned to this day, the said
 Surrogate after having duly examined the said account,
 now here finds the state and condition of said account to

247

248

249

Exhibit B, Annexed to Stipulation of Facts.

250 be as set forth in the following summary statement thereof, made by the said Surrogate as judicially settled and allowed by him, to be recorded with and taken to be a part of the decree in this matter, to wit:

A summary statement of the account of proceedings of City Bank Farmers Trust Company, formerly known as The Farmers' Loan and Trust Company, as trustee under subdivisions "c" and "d" of ITEM IX of the last will and testament of Angier B. Duke, deceased, of the respective trusts therein created for the benefit of Angier B. Duke, Jr., and Anthony Newton Duke and remaindermen, made by the Surrogate as judicially settled and allowed:

251

SECTION I

RELATING TO TRUST CREATED FOR THE BENEFIT OF ANTHONY
NEWTON DUKE AND REMAINDERMEN

AS TO PRINCIPAL

Accountant is charged as follows:

With amount of all property
originally received and con-
stituting principal, as shown
in Schedule A

\$3,823,027.79

With amount of increase in
said trust, as shown in
Schedule B

21,635.44

\$3,844,663.23

252

Accountant is credited as follows:

With amount of all pay-
ments made for necessary ex-
penses chargeable against
principal, as shown in
Schedule C

12,806.75

Leaving a balance of
invested, as shown in
Schedule J

\$3,831,856.48

Exhibit B, Annexed to Stipulation of Facts.

AS TO INCOME

253

Accountant is charged as follows:

With amount of all income
received and earned by said
trust, as shown in Schedule
D

\$ 962,359.54

Accountant is credited as follows:

With amount of all pay-
ments made for necessary
expenses chargeable against
income, as shown in Sched-
ule F

\$ 29,608.74

254

With amount of all commis-
sions retained by account-
ant on account of income,
as shown in Schedule G

10,663.22

With amount of all pay-
ments made to or for the ac-
count of Anthony Newton
Duke, from income, as shown
in Schedule H

32,500.00

72,771.96

Leaving a balance of
invested as shown in
Schedule J

\$ 889,587.58

255

Exhibit B, Annexed to Stipulation of Facts.

256

SECTION II

RELATING TO TRUST CREATED FOR THE BENEFIT OF ANGIER
B. DUKE, JR., AND REMAINDERMEN

AS TO PRINCIPAL

Accountant is charged as follows:

With amount of all property
originally received and con-
stituting principal, as shown
in Schedule A

\$3,823,027.79

257

With amount of increase in
said trust, as shown in
Schedule B

21,580.44 \$3,844,608.23

Accountant is credited as follows:

With amount of all pay-
ments made for necessary
expenses chargeable against
principal, as shown in
Schedule C

12,798.62

Leaving a balance of
invested, as shown in
Schedule J

\$3,831,809.61

258

AS TO INCOME

Accountant is charged as follows:

With amount of all income
received and earned by said
trust, as shown in Schedule
D

963,277.83

Exhibit B, Annexed to Stipulation of Facts.

Accountant is credited as follows:

259

With amount of all payments made for necessary expenses chargeable against income, as shown in Schedule F

\$ 29,815.82

With amount of all commissions retained by accountant on account of income, as shown in Schedule G

10,674.60

With amount of all payments made to or for the account of Angier B. Duke, Jr., from income, as shown in Schedule H

32,500.00

260

72,990.42

Leaving a balance of invested, as shown in Schedule J

\$ 890,287.41

AND it appearing that said trustee has fully accounted for all of the moneys and property of the said trust estates which have come or should have come into its hands as trustee as aforesaid during the period covered by its said account, and said account having been duly adjusted by the said Surrogate, and a summary statement of the same having been made as above set forth and herewith recorded; it is

261

ORDERED, ADJUDGED AND DECREED that said account be and the same hereby is judicially settled and allowed in all respects as filed; and it is further

ORDERED, ADJUDGED AND DECREED that out of the balance of principal so found as above remaining in its hands as trustee under subdivision "d" of ITEM IX of said will of

Exhibit B, Annexed to Stipulation of Facts.

262 the trust therein created for the benefit of Anthony Newton Duke, accounted for in Section I of said account, said accountant retain and pay unto itself the sum of \$38,641.71 as and for the commissions to which it is entitled on this accounting for receiving the sum of \$3,844,663.23 of principal and for paying out the sum of \$12,806.75 of principal; and it is further

263 ORDERED, ADJUDGED AND DECREED that out of the balance of principal so found as above remaining in its hands as trustee under subdivision "c" of ITEM IX of said will of the trust therein created for the benefit of Angier B. Duke, Jr., accounted for in Section II of said account, said accountant retain and pay unto itself the sum of \$38,641.06, as and for the commissions to which it is entitled on this accounting for receiving \$3,844,608.23 of principal, and for paying out \$12,798.62 of principal; and it is further

264 ORDERED, ADJUDGED AND DECREED that out of the balances of principal so found as above remaining in its hands as trustee of said trusts, said accountant retain and pay unto itself the sum of \$6.05 as and for its costs and disbursements as taxed herein, and that it pay to William H. Hickin, Esq., the sum of \$6500.00, which amount is hereby awarded to him for his services as Special Guardian for the infant respondents in this proceeding, the aforementioned costs and allowance to be charged, one-half thereof to the principal of the trust created under subdivision "c" of ITEM IX of said will, and one-half thereof to the principal of the trust created under subdivision "d" of ITEM IX of said will.

AND it appearing that said testator in and by subdivision "e" of ITEM IX of his will, provided in part as follows:

"The said Trustee shall have power to hold, manage and invest, and from time to time as need be,

Exhibit B, Annexed to Stipulation of Facts.

to re-invest the properties held in said Trust for the benefit and advantage of the beneficiaries thereof in such good and productive stocks, bonds or mortgages as will produce, if possible, a sure and regular income. 265

The said Trustee and its successors shall have power to retain any investments made by me in my lifetime without liability for loss or shrinkage, or to change the property received by it under this will into other property as it deems best for the respective beneficiaries, and to that end it shall have power to sell, assign, transfer, exchange, deliver and convey any property at any time, and it shall invest the proceeds of all such sales and exchanges in any property it thinks best; but in all investments I charge it and its successors to be more careful as to the security of the funds than as to the acquisition of higher rates of interest, my desire being to have my property prudently and securely managed rather than hazarded in what may promise great gains." 266

AND the Court having been asked to construe subdivision "e" of ITEM IX of said will with respect to the investment powers of said trustee, now, after due deliberation

FINDS, ADJUDGES AND DETERMINES: 267

That it was the intention of the testator to and he did by the provisions of subdivision "e" of ITEM IX of said will,

(1) Authorize and empower accountant as trustee to retain as part of the principal of the trusts created under subdivisions "c" and "d" of ITEM IX of said will, any investments made by testator in his lifetime.

Exhibit B, Annexed to Stipulation of Facts.

268

J. P. O'B.

(2) Authorize and empower his trustee to invest and reinvest the principal and income of the trusts created under subdivisions "c" and "d" of ITEM IX of said will in securities other than those authorized by law for the investment of trust funds, but (3) in all investments the testator charges his trustee to be more careful as to the security of the funds than as to the acquisition of higher rates of interest, and expressed his desire to have his property prudently and securely managed, rather than hazard it in what may promise great gains. But notwithstanding the authority granted by said will as to investments, said trustee shall at all times exercise keen and alert judgment with respect to same.

269

AND it appearing that said testator in and by subdivision "d" of ITEM IX of his will gave, devised and bequeathed one-fourth of his residuary estate to City Bank Farmers Trust Company in trust to collect the income thereof and to pay, apply and distribute the same to and for the support, education and maintenance of his son Anthony Newton Duke, during his lifetime, with provision for the disposition of accumulated income and of the remainder of said trust as more fully in said clause provided;

270

AND it appearing that after making the payments and deductions hereinbefore directed to be made from the principal and income of the trust created for the benefit of Anthony Newton Duke, accounted for in Section I of said account, there will remain in the hands of said accountant as trustee of said trust a balance of principal of \$3,789,934.25, and a balance of income of \$889,587.58, invested as more fully set forth in Schedule J of Section I of said account; it is

ORDERED, ADJUDGED AND DECREED that said accountant continue to hold and administer the aforementioned bal-

Exhibit B, Annexed to Stipulation of Facts.

ances of principal and income in trust for the benefit of Anthony Newton Duke and remaindermen, upon the terms and conditions more fully set forth in subdivision "d" of ITEM IX of said will; 271

AND it appearing that said testator in and by subdivision "c" of ITEM IX of his will gave, devised and bequeathed one-fourth of his residuary estate to City Bank Farmers Trust Company in trust to collect the income thereof and to pay, apply and distribute the same to and for the support, education and maintenance of his son Angier B. Duke, Jr. during his lifetime, with provision for the disposition of accumulated income and of the remainder of said trust as more fully in said clause provided; 272

AND it appearing that after making the payments and deductions hereinbefore directed to be made from the principal and income of the trust created for the benefit of Angier B. Duke, Jr., accounted for in Section II of said account, there will remain in the hands of said accountant as trustee of said trust a balance of principal of \$3,789,888.02, and a balance of income of \$890,287.41, invested as more fully set forth in Schedule J of Section II of said account; it is

ORDERED, ADJUDGED AND DECREED that said accountant continue to hold and administer the aforementioned balances of principal and income in trust for the benefit of Angier B. Duke, Jr. and remaindermen, upon the terms and conditions more fully set forth in subdivision "c" of ITEM IX of said will; and it is further 273

ORDERED, ADJUDGED AND DECREED that said accountant upon complying with the provisions of this decree be and it hereby is discharged from all further liability, responsibility or accountability with respect to any matter or thing contained in the account herein, or in this decree, except

Exhibit B, Annexed to Stipulation of Facts.

- 274 that it shall remain accountable as trustee for the aforementioned balances of principal and income hereinbefore directed to be administered by it in accordance with the provisions of subdivisions "c" and "d" of ITEM IX of said will.

JOHN P. O'BRIEN

Surrogate

Filed Jan. 3rd, 1931.

ACCOUNT IN TRUST FOR ANTHONY NEWTON DUKE
SCHEDULE F

- 275 containing a statement of all payments made by accountant for necessary expenses chargeable against income.

1926

| | | |
|---------|--|---------|
| Nov. 30 | Cost of Federal and State stamps for transfer of 250 rights, Marland Oil Company | \$ 1.00 |
|---------|--|---------|

1927

| | | |
|-------------|--|----------|
| Mar. 14 | Paid Collector of Internal Revenue, 1st quarterly installment on 1926 Federal income tax on undistributed income | 1,465.16 |
| 276 Apr. 13 | Paid The State Tax Commissioner 1926 New York State income tax on undistributed income | 1,655.18 |
| 26 | Paid Notary Fee on 1926 Income Tax Returns | 1.00 |
| June 14 | Paid Collector of Internal Revenue 2nd quarterly installment on 1926 Federal Income Tax on undistributed income | 1,465.16 |
| July 26 | Paid Department of Finance and Taxation, additional 1926 New York State Income Tax on undistributed income | 69.34 |

Exhibit B, Annexed to Stipulation of Facts.

| | | | |
|----------|---|----------|-----|
| Sept. 14 | Paid Collector of Internal Revenue third quarterly installment on 1926 Federal income tax on undistributed income | 1,465.16 | 277 |
| Dec. 14 | Paid Collector of Internal Revenue 4th installment on 1926 Federal income tax on undistributed income | 1,465.16 | |
| 1928 | | | |
| Mar. 14 | Paid Collector of Internal Revenue 1st quarterly installment on 1927 Federal income tax on undistributed income | 1,439.51 | |
| Apr. 13 | Paid Department of Taxation and Finance, 1927 New York State income tax on undistributed income | 2,597.72 | 278 |
| 23 | Paid Notary Fee on income tax returns for 1927 | .75 | |
| June 13 | Paid Collector of Internal Revenue 2nd quarterly installment on 1927 Federal income tax | 1,439.51 | |
| Sept. 14 | Paid Collector of Internal Revenue 3rd quarterly installment on 1927 Federal income tax | 1,439.51 | |
| Dec. 3 | Paid Collector of Internal Revenue 4th quarterly installment on 1927 Federal income tax on undistributed income | 1,439.50 | 279 |
| 1929 | | | |
| Mar. 14 | Paid Collector of Internal Revenue, 1st quarterly installment on 1928 Federal income tax on undistributed income | 2,417.79 | |
| Apr. 4 | Paid Department of Taxation and Finance, 1928 New York State income tax on undistributed income | 3,993.17 | |
| 17 | Paid Notary Fees on 1928 income tax returns | .75 | |

Exhibit B, Annexed to Stipulation of Facts.

| | | | |
|-----|----------|---|-------------|
| 280 | June 12 | Paid Collector of Internal Revenue, second quarterly installment on 1928 Federal income tax on undistributed income | 2,417.79 |
| | Sept. 12 | Paid Collector of Internal Revenue 3rd quarterly installment 1928 Federal income tax | 2,417.79 |
| | Dec. 13 | Paid Collector, of Internal Revenue 4th quarterly installment 1928 Federal income tax | 2,417.79 |
| | | | <hr/> |
| | | | \$29,608.74 |

281

CITY BANK FARMERS TRUST
COMPANYBy J. G. KILBRETH
Trust OfficerACCOUNT IN TRUST FOR ANTHONY NEWTON DUKE
SCHEDULE Gcontaining a statement of all commissions retained by
accountant on account of income.

| | | | | |
|-----|---------|--|--|-------------|
| | 1927 | | | |
| 282 | Feb. 4 | Paid The Farmers' Loan and Trust Company, commissions on account of income | | \$ 2,200.85 |
| | 1928 | | | |
| | Mar. 6 | do do | | 2,468.24 |
| | 1929 | | | |
| | Mar. 13 | do do | | 4,262.97 |
| | Dec. 31 | Paid City Bank Farmers Trust Company, commissions on account of income | | 1,731.16 |
| | | | | <hr/> |
| | | | | \$10,663.22 |

Exhibit B, Annexed to Stipulation of Facts.

Computation:

283

| | RECEIVING | PAYING | |
|---------|---------------------|--------------------|--------------------|
| 1927 | | | |
| Mar. 1 | \$359,811.57 | \$ 8,743.42 | \$ 3,742.42 |
| 1928 | | | |
| Mar. 1 | 122,058.40 | 19,080.24 | 1,494.08 |
| 1929 | | | |
| Mar. 1 | 228,701.80 | 20,940.28 | 2,583.78 |
| Dec. 31 | 251,787.77 | 24,008.02 | 2,842.94 |
| | <u>\$962,359.54</u> | <u>\$72,771.96</u> | <u>\$10,663.22</u> |

284

CITY BANK FARMERS TRUST
COMPANYBy J. G. KILBRETH
Trust OfficerACCOUNT IN TRUST OF ANTHONY NEWTON DUKE
SCHEDULE Hcontaining a statement of all payments made to or for the
account of Anthony Newton Duke, from income.

285

1926

Nov. 22 Paid Cordelia Biddle Robertson, Gen-
eral Guardian for Anthony Newton
Duke \$ 2,500.00

1927

| | | | |
|---------|----|----|----------|
| Feb. 8 | do | do | 2,500.00 |
| Apr. 30 | do | do | 2,500.00 |
| July 30 | do | do | 2,500.00 |
| Oct. 31 | do | do | 2,500.00 |

Exhibit B, Annexed to Stipulation of Facts.

| | | | | |
|-----|---------|----|----|-------------|
| 286 | 1928 | | | |
| | Jan. 31 | do | do | 2,500.00 |
| | Apr. 30 | do | do | 2,500.00 |
| | July 31 | do | do | 2,500.00 |
| | Oct. 31 | do | do | 2,500.00 |
| | 1929 | | | |
| | Jan. 31 | do | do | 2,500.00 |
| | Apr. 30 | do | do | 2,500.00 |
| | July 31 | do | do | 2,500.00 |
| | Oct. 31 | do | do | 2,500.00 |
| | | | | <hr/> |
| | | | | \$32,500.00 |

287

CITY BANK FARMERS TRUST
COMPANYBy J. G. KILBRETH
Trust OfficerACCOUNT IN TRUST FOR ANGIER B. DUKE, JR.
SCHEDULE Fcontaining a statement of all payments made by accountant
for necessary expenses chargeable against income.

| | | | | |
|-----|---------|--|----|----------|
| 288 | 1926 | | | |
| | Nov. 30 | Cost of Federal Stamps on the transfer of 250 rights, Morland Oil Company | \$ | 1.00 |
| | 1927 | | | |
| | Mar. 14 | Paid Collector of Internal Revenue, 1st quarterly installment on 1926 Federal income tax on undistributed income | | 1,486.30 |
| | Apr. 13 | Paid The State Tax Commission, 1926 New York State income tax on undistributed income | | 1,668.89 |

Exhibit B, Annexed to Stipulation of Facts.

| | | | |
|----------|--|----------|----------|
| Apr. 26 | Paid Notary Fee on income tax return for 1926 | 1.00 | 289 |
| June 14 | Paid Collector of Internal Revenue, 2nd quarterly installment on 1926 Federal income tax on undistributed income | 1,486.30 | |
| July 26 | Paid Department of Taxation and Finance, additional 1926 New York State income tax on undistributed income | 69.37 | |
| Sept. 14 | Paid Collector of Internal Revenue, 3rd quarterly installment on 1926 Federal income tax on undistributed income | 1,486.30 | 290 |
| Dec. 14 | Paid Collector of Internal Revenue, 4th installment of 1926 Federal income tax on undistributed income | 1,486.29 | |
| 1928 | | | |
| Mar. 14 | Paid Collector of Internal Revenue, 1st quarterly installment on 1927 Federal income tax on undistributed income | 1,439.05 | |
| 21 | Paid Collector of Internal Revenue, additional Federal income tax on undistributed income | \$1.00 | |
| | Interest | .03 | 1.03 291 |
| Apr. 13 | Paid Department of Taxation and Finance, 1927 New York State income tax on undistributed income | 2,605.99 | |
| 23 | Paid Notary Fees on 1927 income tax returns | .75 | |
| June 13 | Paid Collector of Internal Revenue, 2nd quarterly installment on 1927 Federal income tax on undistributed income | 1,439.05 | |

Exhibit B, Annexed to Stipulation of Facts.

| | | | |
|------|----------|---|-------------------|
| 292 | Sept. 14 | Paid Collector of Internal Revenue, 3rd quarterly installment on 1927 Federal income tax on undistributed income | 1,439.05 |
| | Dec. 13 | Paid Collector of Internal Revenue, 4th quarterly installment on 1927 Federal income tax on undistributed income | 1,439.05 |
| 1929 | | | |
| 293 | Mar. 13 | Paid Collector of Internal Revenue, 1st quarterly installment on 1928 Federal income tax on undistributed income | 2,444.82 |
| | Apr. 12 | Paid Department of Taxation and Finance, 1928 New York State income tax on undistributed income | 3,986.38 |
| | 17 | Paid Notary Fee on 1928 income tax returns | .75 |
| | June 12 | Paid Collector of Internal Revenue, 2nd quarterly installment on 1928 Federal income tax on undistributed income | 2,444.82 |
| | Sept. 12 | Paid Collector of Internal Revenue, 3rd quarterly installment on 1928 Federal income tax on undistributed income | 2,444.82 |
| 294 | Dec. 13 | Paid Collector of Internal Revenue, 4th quarterly installment on 1928 Federal income tax on undistributed income | 2,444.81 |
| | | | <hr/> \$29,815.82 |

CITY BANK FARMERS TRUST
COMPANY

By J. G. KILBRETH
Trust Officer

*Exhibit B, Annexed to Stipulation of Facts.*ACCOUNT IN TRUST FOR ANGIER B. DUKE, JR.
SCHEDULE G

295

containing a statement of all commissions retained by
accountant on account of income.

1927

Mar. 11 Paid The Farmers' Loan and Trust
Company on account of commission— \$ 2,198.69

1928

Mar. 6 do do 2,480.51

1929

Mar. 13 do do 4,268.96

Dec. 31 Paid City Bank Farmers Trust Com-
pany on account of commission 1,726.44

296

\$10,674.60

Computation:

| | RECEIVING | PAYING | |
|---------|---------------------|--------------------|--------------------|
| 1927 | | | |
| Mar. 1 | \$360,270.23 | \$ 8,748.05 | \$ 3,747.05 |
| 1928 | | | |
| Mar. 1 | 122,115.39 | 19,180.35 | 1,495.90 |
| 1929 | | | |
| Mar. 1 | 229,175.17 | 20,952.63 | 2,588.66 |
| Dec. 31 | 251,717.04 | 24,109.39 | 2,842.99 |
| | <u>\$963,277.83</u> | <u>\$72,990.42</u> | <u>\$10,674.60</u> |

297

CITY BANK FARMERS TRUST
COMPANYBy J. G. KILBRETH
Trust Officer

Exhibit B, Annexed to Stipulation of Facts.

298

**ACCOUNT IN TRUST FOR ANGIER B. DUKE, JR.
SCHEDULE H**

containing a statement of all payments made to or for the
account of Angier B. Duke, Jr., from income.

1926

Nov. 22 Paid Cordelia Biddle Robertson, Gen-
eral Guardian of Angier B. Duke, Jr.,
on account of income \$ 2,500.00

1927

299 Jan. 31 do do 2,500.00
Apr. 30 do do 2,500.00
July 30 do do 2,500.00
Oct. 31 do do 2,500.00

1928

Jan. 31 do do 2,500.00
Apr. 30 do do 2,500.00
July 31 do do 2,500.00
Oct. 31 do do 2,500.00

1929

Jan. 31 do do 2,500.00
Apr. 30 do do 2,500.00
July 31 do do 2,500.00
Oct. 31 do do 2,500.00

300

\$32,500.00

**CITY BANK FARMERS TRUST
COMPANY**

By J. G. KILBRETH
Trust Officer

Statement of the Evidence.

301

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

B. T. A. Docket No. 76031.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of Angier
B. Duke, Deceased, for the Benefit of Anthony Newton
Duke,

Petitioner,

—against—

302

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

B. T. A. Docket No. 76046.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of Angier
B. Duke, Deceased, for the Benefit of Angier B.
Duke, Jr.,

Petitioner,

—against—

303

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

IT IS STIPULATED AND AGREED between the parties in the
above-entitled cases, by their respective counsel of record,
that the following statement of the evidence in narrative
form, together with the exhibits annexed thereto and the
stipulation of facts filed separately herein, contains, in

Statement of the Evidence.

304 substance, all the evidence heard and received by the United States Board of Tax Appeals at the hearing of said cases held in New York, N. Y., on April 26, 1938, and all statements made by counsel for the respective parties, which are material to the questions presented and involved in the several assignments of error appended to and constituting a part of the petitions for review heretofore filed in these cases:

305 At the hearing of the cases counsel for the petitioners stated that the deficiencies had been determined by the Commissioner of Internal Revenue on the basis of an issue which had been conceded by the petitioners, and that in the petitions which had been filed with the Board of Tax Appeals the petitioners had claimed refunds based on their claim that each of the petitioners was entitled to deduct in its Federal income tax return for the year 1931 trustee's commissions of approximately \$38,000.00. Counsel stated that those commissions were computed on the basis of principal of the respective trusts, pursuant to the provisions of Section 285 of the Surrogate's Court Act of the State of New York, which sets forth the rates of commissions to which a trustee is entitled for its services in such cases; and that while the commissions in question were computed on the basis of principal and were paid out of principal, each trust in the year in question had accumulated income of approximately \$150,000.00, which was more than ample to cover the commissions. Counsel stated that the petitioners contended that the commissions were properly deductible as business expenses; that the Board of Tax Appeals had held in a number of cases that a trustee engaged in managing a trust estate which has its funds invested in income-producing property is engaged in trade or business, and that commissions paid to the trustee for such services are business expenses. Counsel stated that the Board had held in the case of *Watson v. Commissioner* (35 B. T. A. 706), that it makes no difference whether such commissions

306

Statement of the Evidence.

are computed on the basis of taxable income or on the basis of nontaxable income, that they are business expenses for the services of the trustee and are deductible from taxable income; also, that there is an early Bureau ruling, S. M. 2463 (III-2 C. B. 91), which holds that commissions computed on the basis of principal are allowable as income tax deductions, and that the ruling had been in force so long and there had been so many reenactments of the applicable provisions of the revenue acts while the ruling had been in force, that the ruling had received Congressional sanction. Counsel stated also that S. M. 2463 was then still in full force and effect, and that he knew of no reason for the disallowance of the commissions. 307

Counsel for the respondent stated that the reason for the respondent's disallowance of the commissions and for the trial of the cases was that the facts in the case on trial did not come within the facts stated in S. M. 2463; that the two large, unusual items of commissions, amounting to more than \$38,000.00 each, were commissions which under the decree of the court attached to the stipulation of facts were allowed to the trustees for receiving the corpus of the trust estates, amounting to more than \$3,000,000.00 in each case; and that the trustees, which qualified as such at the time of the probate of the testator's will in 1923, actually received the corpus of the trust estates in 1926. Counsel stated that ordinary commissions with respect to the current transactions within the taxable year for receiving and paying out income, and all other expenses incurred in connection with the production of income in the taxable year had been allowed by the respondent as deductions as business expenses. Counsel stated that on the title page of each Internal Revenue Bulletin, in one of which S. M. 2463 appears, it is provided that "each ruling embodies the administrative application of the law and the Treasury decisions to the entire state of facts upon which a particular case rests. It is especially to be noted that the same result will not 308 309

Statement of the Evidence.

310 necessarily be reached in another case unless all the material facts are identical with those in the reported case". Counsel recited certain of the facts stated in S. M. 2463 in reference to the trust there under consideration, and stated that those were not the facts in the present cases; that the commissions in issue were not paid out of the income of the trusts and, under the decree of the court, they could not be so paid; that they were charged against principal, and that any income remaining before taking these commissions into consideration was to be accumulated and distributed to the beneficiaries when they reached the age of twenty-one years, undiminished by such commissions. Counsel stated that the fact that the commissions were charge-
311 able entirely against corpus distinguished the facts in the present cases from those which were under consideration in S. M. 2463; and that such facts also distinguished the present case from the case of Watson v. Commissioner, where the commissions were paid out of income.

CROSBY T. SMITH, a witness called by and on behalf of the petitioners, having been duly sworn, testified as follows:

Direct examination:

312 I am an Assistant Trust Officer of City Bank Farmers Trust Company, and have been connected with that company for over 13½ years. During that period of years I have been familiar with matters pertaining to the administration of estates and trusts of which City Bank Farmers Trust Company is executor and trustee, and I am familiar in a general way with the duties and activities of a trustee of a testamentary trust. I have charge of the administration of the two trusts under the last will and testament of Angier B. Duke, deceased, one for the benefit of Anthony Newton Duke and the other for the benefit of Angier B.

Statement of the Evidence.

Duke, Jr., which are referred to in the stipulation of facts herein; I have been in charge of the trusts for approximately the last six months; prior to that time I was not in charge of them; I have charge and control of the records pertaining to the administration of those trusts since their beginning. 313

At this point the following question was asked by counsel for the petitioners, the following answers given by the witness, and the following statements were made by Mr. Craven, counsel for the petitioners, by Mr. Johnston, counsel for the respondent, and by the Board Member.

Q. Mr. Smith, it is stipulated in this case that in the year 1931, City Bank Farmers Trust Company received commissions of \$38,641.71 pursuant to Section 285 of the Surrogate's Court Act of New York, from the trust for Anthony Newton Duke, and that in the same year it received similar commissions in the sum of \$38,641.06 from the trust for Angier B. Duke, Jr. I wish to call your attention further to the fact that under the provisions of Section 285 of the Surrogate's Court Act, it is provided that such commissions are payable to a testamentary trustee for his services in such an official capacity. 314

Will you state whether or not you are familiar with the nature of the duties and activities of City Bank Farmers Trust Company as trustee of these two trusts for which it received those commissions? 315

Mr. Johnston: If Your Honor please, I object to the question on the ground that the very decree which we have stipulated states the reason for it. This is in the case of City Bank Farmers Trust Company, Angier B. Duke.

The Member: May I suggest this, Mr. Johnston? That the witness is simply asked whether he was familiar with those duties and he has already answered that he is, and it occurs to me that perhaps

Statement of the Evidence.

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your objection will come a little later as a matter of course.

Mr. Johnston: I just wanted to call your attention to the fact that under this decree these commissions are not paid for services, that is, during this taxable year, at all. They are paid expressly for receiving the principal of the trust.

The Member: Yes, I understand that.

317

Mr. Craven: If Your Honor please, if I may take just a few minutes, I think I can clear up a great deal of doubt and misunderstanding on that point. Of course, I don't think it needs any argument on my part that a trustee doesn't get \$38,000 of commission just for reaching out his hand and receiving principal. It is quite clear under the New York law that he gets those commissions—

318

The Member: I don't see any necessity for arguing the matter now. I think I see the point that there is between you gentlemen, at least I hope I do, and all I need, I believe, is this evidence, and then upon the briefs I can decide it. I believe I see the point. I don't think it is necessary to argue it now unless you think there is something indefinite here, or that I ought to know that would justify arguing it at this time; otherwise proceed, but there doesn't seem to me there is any reason for argument.

Mr. Craven: I have New York cases to support my position.

The Member: We don't plan to argue about those cases at this time. It is my suggestion that you brief them. If you think there is something you should advise me of in order that I might follow the testimony, I certainly would be unjustified in refusing to hear argument. However, I think I see your point.

Mr. Craven: Well, I think the contention of counsel for the respondent is that the commissions were

Statement of the Evidence.

paid solely for the act of the trustee in receiving principal. It is well settled under the New York law that that is merely a basis for measuring compensation, and I simply want to prove by this witness the duties and activities which the trustee performs for those commissions. 319

The Member: Go ahead and offer your testimony and we will rule upon it as objections arise.

• By Mr. Craven:

Q. Did you state that you were familiar with those duties and activities? A. I am.

Q. Will you state in a general way just what the nature of those duties and activities have been since the trust has been under your supervision, and from your general knowledge of what was done prior thereto? 320

The testimony of the witness was continued as follows:

Customarily, at the time the trustee starts to act as trustee of any trust, the securities and other assets of the trust are examined with great care and investigated by a committee of the investment department, and are often submitted to a senior committee. After the trust is established the securities of the trust receive constant review; generally at least two to four times a year they are gone over by a junior or senior committee, in addition to receiving weekly or monthly reviews by the investment clerks in charge, and also the senior officers in charge of the particular trust. In addition to the investment reviews, very often the decision is arrived at that certain securities should be liquidated and others purchased. The income from the securities is collected; in the case of bonds, the coupons are cut; in the case of stocks, dividends are collected, and the income is credited to the account. Books are kept; statements are rendered to the 321

Statement of the Evidence.

322 interested parties at regular intervals; income tax returns are prepared and filed; and detailed reports are kept of all the assets of the accounts.

During the year 1931 and prior and subsequent thereto, the funds of these trusts were invested in income-producing stocks and bonds. The investment department and investment committee of City Bank Farmers Trust Company were active during all those periods in supervising the investments in which the funds were invested; the funds were reviewed several times during 1931. I have stated what the general practice of a trustee of a testamentary trust is; these trusts have been administered at all times in accordance with that general practice.

323 The ledger sheet which has been exhibited to me, entitled "Principal Anthony Newton Duke", is our bookkeeping sheet of the account as to principal in the trust to which we have referred, for the benefit of Anthony Newton Duke, covering the year 1931; it shows receipts and disbursements of funds pertaining to the principal of this trust. The seven ledger sheets which have been exhibited to me, entitled "Income Anthony Newton Duke", are our ledger sheets covering receipts and disbursements of income in this trust for Anthony Newton Duke for the year 1931.

324 At this point the paper first identified by the witness was offered and received in evidence and marked "Petitioners' Exhibit 1", and the seven ledger sheets next identified by the witness were offered and received in evidence and marked "Petitioners' Exhibit 2". Said exhibits are attached hereto and made a part hereof.

The testimony of the witness was continued as follows:

The ledger sheet which has been exhibited to me, entitled "Principal Angier B. Duke", is our ledger sheet showing the record of receipts and disbursements for the year 1931 in the principal account of the trust for the benefit of Angier B. Duke, Jr. The seven ledger sheets which have been exhibited to me, entitled "Income Angier B. Duke",

Statement of the Evidence.

are our ledger sheets showing the receipts and disbursements of income for the year 1931 in the trust for the benefit of Angier B. Duke, Jr. 325

At this point the ledger sheet first identified by the witness was offered and received in evidence and marked "Petitioners' Exhibit 3", and the seven ledger sheets next identified by the witness were offered and received in evidence and marked "Petitioners' Exhibit 4". Said exhibits are attached hereto and made a part hereof.

The testimony of the witness was continued as follows:

The two sheets which have been exhibited to me, entitled "Trust for Anthony Newton Duke", which purport to contain certain diary entries or a running record of events, show the current diary of investment reviews and other action taken in connection with investments in the trust for Anthony Newton Duke; they cover such activities for the year 1931. The two similar sheets which have been exhibited to me, entitled "Trust for Angier B. Duke, Jr.", show the current diary of action taken in connection with investments for the Angier B. Duke, Jr., trust for the year 1931. 326

At this point the two sheets first identified by the witness were offered and received in evidence and marked "Petitioners' Exhibit 5", and the two sheets next identified by the witness were offered and received in evidence and marked "Petitioners' Exhibit 6". Said exhibits are attached hereto and made a part hereof. 327

The testimony of the witness was continued as follows:

I testified that the sheets which have just been identified and offered in evidence cover the activities of the trustee of these trusts for the year 1931; the activities of the trustee of the trusts have been of a similar nature in all other years since City Bank Farmers Trust Company has been acting as such trustee. It is the practice of City Bank Farmers Trust Company as trustee of these trusts to do everything in connection with the administra-

Statement of the Evidence.

328 tion of such trusts which it deems necessary and proper to conserve principal and provide income. That practice has been followed in the administration of these trusts. Cross examination:

I have been connected with the Trust Department of City Bank Farmers Trust Company since 1924. I understand that Angier B. Duke died September 3, 1923; that his will was admitted to probate on September 18, 1923, and on or about that date City Bank Farmers Trust Company qualified as trustee under the will. I understand that the principal of the two trusts at issue was received by the trustee from the executors of the last will and testament of Angier B. Duke on February 26, 1926. I do not know why the trustee waited until the year 1931 to petition to the court to allow the commissions which counsel for the respondent states were for receiving the principal of the trusts. As far as I know the commissions could have been allowed to the trustee at the time the corpus was received on or about February 26, 1926. There was no question as to the ability of the trusts to pay the trustees' commissions when they first became payable under the law.

330 City Bank Farmers Trust Company has a large Trust Department; I would say that in the year 1931 it had under its supervision roughly about three or four hundred trust accounts somewhat comparable with the ones now under consideration. The trust committee looked after and supervised these three or four hundred trusts generally in a manner comparable to that in which they looked after the Angier B. Duke trust and the Anthony N. Duke trust. If City Bank Farmers Trust Company, in performing the activities shown by Petitioners' Exhibits 5 and 6 with respect to the two trusts under consideration here, was engaged in a trade or business, it was also engaged in a trade or business with respect to some three or four hundred other different trusts.

Statement of the Evidence.

The balance to which counsel for the respondent has referred in the principal account of \$13,147.37 as of December 31, 1930, is an overdraft balance. That does not purport to show the total balance of principal which the trust held at that time; it is merely the principal cash account, not the security account. The exhibit shows the cash receipts and disbursements for the period covered by it. Exhibit 1 shows an item of \$38,641.71 as commissions charged against the principal account and shows that the trustee was receiving \$3,444,663.23 and paying out \$12,806.75 on account of principal, pursuant to the decree of the court of January 2, 1931.

331

I understand that paragraph 7 of the stipulation of facts shows that the petitioner as trustee, pursuant to the provisions of subdivision (d) of Item IX of the will, distributed \$6,281.98 out of the gross income in the year 1931 to Anthony N. Duke, the beneficiary of the trust, leaving net undistributed income of \$115,237.65. Under the terms of the will of Angier B. Duke and the plan which City Bank Farmers Trust Company pursued in handling the trust, that \$115,237.65 was accumulated and would be distributed to the beneficiary when he reached twenty-one years of age. The trustee received each year commissions computed on income, and deductions for those commissions were taken and allowed on the return. This item of \$38,641.71 has been paid only once to date.

332

333

Re-direct examination:

As to the difference between the method of a trustee in taking commissions computed on the basis of income, and the method of taking commissions computed on the basis of principal, income commissions are ordinarily computed by the Trust Company on an annual basis, the rates being the same as those on principal, as I understand the statutes of New York State, while principal commissions are taken, as I understand it, one-half at the time of receiving, or

Statement of the Evidence.

334 allowable as of the date of receipt of principal, and one-half as of the date of termination of the trust. The principal commissions, as I understand it, can be taken only under a court order, while income commissions can be taken each year. It is not the practice of City Bank Farmers Trust Company to pay its commissions computed on the basis of principal before those commissions have been allowed by the proper court; I know of no case where we have done that. We apply for those commissions at the time we file our accounting as trustee. It is ordinarily the practice of City Bank Farmers Trust Company and trust companies in general, and other trustees, to wait until there is some reason for accounting before doing so, and, at the time of such accounting, to make application for commissions. In connection with the accounting on which the Surrogate's Court rendered the decree on January 2, 1931 (Exhibit B, attached to the stipulation), City Bank Farmers Trust Company applied for a construction of the will of Angier B. Duke; to the best of my knowledge that was the only reason for filing the accounting at the time it was filed.

Re-cross examination:

336 I know the reason for filing the accounting at that time only from the record; I have no personal knowledge of it. The records indicate that there was a desire to obtain a construction of an investment clause of the will. It is true that the Trust Company has been administering this trust since 1926; I don't know in this particular case the reason for obtaining the construction of the provisions of the will in 1931 rather than in 1926, but very often we may hold a security, and five or six years later the company in which the security is held may go into reorganization or something of that kind, which may change the entire nature of the security; we might have to obtain a construction at that time to determine what we could do with the security. I

Statement of the Evidence.

cannot say of my own knowledge whether we had any such situation in these trusts. 337

At the time the corpus was received the principal consisted of bonds and stocks; there were holdings of the Duke Power Company in each trust; they were the chief holdings, and they were still held up until 1931, without material change, unless they were added to. The trustee may have bought more Duke Power Company stocks or bonds during that time, but as far as I know they still have what they started out with. Money was paid out to the beneficiaries from time to time, and the remaining amount of income was invested. Some of that may have been invested in Duke Power Company bonds; I could not tell without looking at the records. The item in Section 1 of Exhibit B to the stipulation, showing an increase of \$21,635.44 up to the time of the accounting, showed an increase in principal; it did not result from income; it resulted from an increase in the market value of securities or from profits taken through the liquidation of securities. The accounting is in two sections, the first section being as to principal and the second section showing income, which section would also contain any income investments. Apparently, the securities in which income was invested were all carried at inventory price; there had been no profit or loss due to sales of such securities. The accounting shows that up to the time of the accounting, income of \$962,359.54 had been received in the trust for Anthony Newton Duke, and that all payments made for necessary expenses chargeable against income, as shown on Schedule F, amounted to about \$29,000.00. It showed the amount of all commissions retained on account of income, on Schedule D, as \$10,000.00, and that the amount of all payments made to or for the account of Anthony Newton Duke from income up to the time of the accounting was \$32,500.00. That would be from the time the trustees took over the principal or corpus in 1926 up until the time of the accounting, which covered the 338 339

Statement of the Evidence.

340 period to December 31, 1930. The exhibit to which counsel is referring is Schedule I to Exhibit B attached to the stipulation.

Petitioners' Exhibit 2 is the income account of the trust for Anthony Newton Duke; this exhibit shows as credits all receipts of income for the period which it covers, and shows as debits all disbursements of income. On February 1st there is a payment of \$2,500.00 to the beneficiary's guardian for support, maintenance and education; on page 37 there is one payment to the guardian of \$2,500.00; on page 38 there is no such debit; on page 39 there is a payment to the guardian of \$2,500.00 on April 30th; on page 341 40 there is no such debit; on page 41 there is no such debit; on page 42 there is no such debit; on page 43 there is a payment to the guardian on July 31st of \$2,500.00; on page 44 there is no such debit; on page 45 there is a payment to the guardian on October 31st of \$2,500.00. Starting with page 36, we have certain debits "transferred to principal account above per proof of cash as of 11/15/26 cost of 100M., State of New Jersey bonds". This shows certain investments out of the funds from the income account in certain bonds and securities. That is the way the accounts were handled generally; we paid certain comparatively small amounts to the guardian for the beneficiaries; we charged against the income account the ordinary current expenses of administering the trusts, and the balance 342 was invested in securities. Both trusts were handled in substantially the same manner.

The Federal income tax return on Form 1040 for the year 1931 of the trust under the will of Angier B. Duke for Angier B. Duke, Jr., was offered and received in evidence as Respondent's Exhibit A. The Federal income tax return for the year 1931, on Form 1040, of the trust under the will of Angier B. Duke for Anthony Newton Duke, was

Statement of the Evidence.

offered and received in evidence as Respondent's Exhibit B. 343
 The fiduciary return of income for the year 1931 of the trust under the will of Angier B. Duke for Angier B. Duke, Jr., was offered and received in evidence as Respondent's Exhibit C. The fiduciary return of income for the year 1931 of the trust under the will of Angier B. Duke for Anthony Newton Duke was offered and received in evidence as Respondent's Exhibit D. Said exhibits are attached hereto and made a part hereof.

The foregoing statement of the evidence contains in substance all the evidence introduced in the above cases which is material to the questions and issues presented and involved in the several assignments of error appended to and constituting a part of the petition for review heretofore filed in these cases. 344

Dated this 18th day of August, 1939.

ROLLIN BROWNE,
 GEORGE CRAVEN,
 Counsel for Petitioners on Review.

J. P. WENCHEL,
 Chief Counsel for Bureau of Internal Revenue,
 Counsel for Respondent on Review.

Approved and ordered filed this 8th day of Sept. 1939. 345

(s) R. L. DISNEY,
 Member.

Respondent's Exhibit A.

346

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY.

FOR CALENDAR YEAR 1931

File This Return With the Collector of Internal Revenue for Your District
on or Before March 15, 1932

File Code 791
Serial Number 300408
District 2—New York

TRUST ANGIER B. DUKE JR. U/W A. B. DUKE #9038—85
c/o CITY BANK FARMERS TRUST CO. TTEE.
22 WILLIAM ST. NEW YORK CITY

347

Item and
Instruc-
tion No.

INCOME

| | | |
|--|------------|--------------|
| 4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source | \$ 738.27 | |
| 10. Dividends on Stock of Domestic Corporations | 104,069.73 | |
| 11. Other Income (including dividends on stock of foreign corporations). (State nature of income) | | |
| (a) British American Tobacco) | 21,768.38 | |
| & Tobacco Securities) | | |
| Trust Corp. Div.) withheld 509.64 | | |
| 12. TOTAL INCOME IN ITEMS 1 TO 11 | | \$126,576.38 |

DEDUCTIONS

348

| | | |
|--|-------------|--------------|
| 14. Taxes Paid. (Explain in Schedule F) N. Y. Income | \$ 5,211.88 | |
| 18. Other Deductions Authorized by Law. (Ex- plain in Schedule F) Balance of British tax not claimed in item #54 | 2,163.70 | |
| 19. TOTAL DEDUCTIONS IN ITEMS 13 TO 18 | | 7,375.58 |
| 20. NET INCOME (Item 12 minus Item 19) | | \$119,200.80 |

Respondent's Exhibit A.

COMPUTATION OF TAX (See Instruction 23)

349

| | |
|---|-------------|
| 33. Net Income (Item 20 above) | \$119200.80 |
| LESS: | |
| 35. Dividends (Item 10) | \$104069.73 |
| 37. Personal Exemption | 1500.00 |
| 38. Total of Items 34 to 37 | 103569.73 |
| 39. Balance (Item 33 minus 38) | \$ 13631.07 |
| 40. Amount taxable at 1½% (not over \$4,000) | 4000.00 |
| 41. Balance (Item 39 minus 40) | \$ 9631.07 |
| 42. Amount taxable at 3% (not over \$4,000) | 4000.00 |
| 43. Amount taxable at 5% (Item 41 minus 42) | \$ 5631.07 |
| 44. Normal Tax (1½% of Item 40) | \$ 60.— |
| 45. Normal Tax (3% of Item 42) | 120.— |
| 46. Normal Tax (5% of Item 43) | 281.55 |
| 47. Surtax on Item 20 (see Instruction 23) | 15500.16 |
| 48. Tax on Net Income (total of Items 44 to 47) | \$ 15961.71 |
| 49. Tax on Capital Gain or Loss (12½% of Col. 8, Sched. D) loss | 161.88 |
| 50. Total of or difference between Items 48 and 49 | \$ 15799.83 |
| 52. Total Tax (Item 50 minus 51) | \$ 15799.83 |
| 53. Less Income Tax Paid at Source | 1.10 |
| 54. Income Tax paid to a foreign country or U. S. possession | 2930.94 |
| 55. Balance of Tax (Item 52 minus Items 53 and 54) | \$ 12866.90 |

350

351

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

CITY BANK FARMERS TRUST COMPANY

A. D. MARKS
Ass't Trust Officer

(Sworn to March 14, 1932.)

Respondent's Exhibit B.

- 352 Schedule "E" of the return, omitted from the printed record, shows the receipt of \$71,833.26 from obligations of a state, territory or political subdivision thereof, and the receipt of \$513.51 from Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions.

Respondent's Exhibit B.**INDIVIDUAL INCOME TAX RETURN**

353

FOR NET INCOME FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

FOR CALENDAR YEAR 1931

File This Return With the Collector of Internal Revenue for Your District
on or Before March 15, 1932

File Code 791
Serial Number 301427
District 2—New York

TTEE. ANTHONY NEWTON DUKE & w A. B. DUKE # 9037—85
CITY BANK FARMERS TRUST CO. TRUSTEE
22 WILLIAM ST. NEW YORK CITY

354

Item and
Instruc-
tion No.

INCOME

- | | |
|---|----------------------|
| 3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds) | \$ 587.80 |
| 10. Dividends on Stock of Domestic Corporations | 104,055.62 |
| 11. Other Income (including dividends on stock of foreign corporations). (State nature of income) | |
| (a) British American Tobacco Co. & Tobacco Securities Trust Corp. | 21,764.42 |
| |) Withheld \$5093.71 |

12. TOTAL INCOME IN ITEMS 1 TO 11 \$126,407.93

Respondent's Exhibit B.

DEDUCTIONS

355

| | |
|---|-----------------|
| 14. Taxes Paid. (Explain in Schedule F) N. Y. State | \$ 5,203.96 |
| 18. Other Deductions Authorized by Law. (Explain in Schedule F) Balance of British Tax not claimed item #54 | 2,157.02 |
| 19. TOTAL DEDUCTIONS IN ITEMS 13 TO 18 | <u>7,360.98</u> |
| 20. NET INCOME (Item 12 minus Item 19) | \$119,046.95 |

COMPUTATION OF TAX (See Instruction 23)

| | |
|---|------------------|
| 33. Net Income (Item 20 above) | \$119046.95 |
| LESS: | |
| 35. Dividends (Item 10) | \$104055.62 |
| 37. Personal Exemption | 1500.00 |
| 38. Total of Items 34 to 37 | <u>105555.62</u> |
| 39. Balance (Item 33 minus 38) | \$ 13491.33 |
| 40. Amount taxable at 1½% (not over \$4,000) | <u>4000.00</u> |
| 41. Balance (Item 39 minus 40) | \$ 9491.33 |
| 42. Amount taxable at 3% (not over \$4,000) | <u>4000.00</u> |
| 43. Amount taxable at 5% (Item 41 minus 42) | \$ 5491.33 |
| 44. Normal Tax (1½% of Item 40) | \$ 60.— |
| 45. Normal Tax (3% of Item 42) | 120.— |
| 46. Normal Tax (5% of Item 43) | 274.57 |
| 47. Surtax on Item 20 (see Instruction 23) | <u>15469.39</u> |
| 48. Tax on Net Income (total of Items 44 to 47) | \$ 15923.96 |
| 49. Tax on Capital Gain or Loss (12½% of Col. 8, Sched. D) loss | <u>100.09</u> |
| 50. Total of or difference between Items 48 and 49 | \$ 15814.87 |
| 52. Total Tax (Item 50 minus 51) | \$ 15814.87 |
| 53. Less Income Tax Paid at Source | 1.90 |
| 54. Income Tax paid to a foreign country or U. S. possession | <u>2936.69</u> |
| 55. Balance of Tax (Item 52 minus Items 53 and 54) | \$ 12876.28 |

356

357

Respondent's Exhibit B.

358

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

CITY BANK FARMERS TRUST COMPANY

A. D. MARKS
Ass't Trust Officer

(Sworn to March 14, 1932.)

359

Schedule "E" of the return, omitted from the printed record, shows the receipt of \$71,381.79 from obligations of a state, territory, or political subdivision thereof, or the District of Columbia, and the receipt of \$514.10 from Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and U. S. possessions.

360

Respondent's Exhibit C.

FIDUCIARY RETURN OF INCOME

361

FOR CALENDAR YEAR 1931

File This Return Not Later Than the 15th Day of the Third Month
Following the Close of the Taxable Year

File Code 791
Serial Number 954024
District 2—N. Y.

Name of Estate or Trust

TTEE. ANQIER B. DUKE JR. U/W A. B. DUKE #9038 P-85

Name and Address of Fiduciary

CITY BANK FARMERS TRUST CO.
22 WILLIAM ST. NEW YORK CITY

362

Item and
Instruc-
tion No.

INCOME

- | | | |
|---|--------------|----------|
| 2. Interest on Bank Deposits, Notes, and Corpora- tion Bonds, etc. (except interest on tax-free covenant bonds) | \$ 682.47 | |
| 3. Interest on Tax-free Covenant Bonds upon which a tax was paid at source | 100.00 | |
| 6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C) Schedule Attached (D) | 1295.06 Loss | |
| 7. Dividends on Stock of Domestic Corporations | 109438.90 | |
| 8. Other Income (including dividends on stock of foreign corporations). (State nature of income) | | |
| (a) Dividends British American Tobacco and Tobacco Securities Trust Ltd. Net | \$17533.97 | |
| British Tax withheld | 5357.48 | 22891.45 |

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9. TOTAL INCOME IN ITEMS 1 TO 8 \$131817.76

DEDUCTIONS

- | | | |
|--|-------------|--|
| 11. Taxes Paid N Y State Income Tax on 1930 Undistributed | \$ 5211.88 | |
| 15. Other Deductions Authorized by Law. (Ex- plain in Schedule E) | 6.11 | |
| 16. TOTAL DEDUCTIONS IN ITEMS 10 TO 15 | 5217.99 | |
| 17. NET INCOME (Item 9 minus Item 16) | \$126599.77 | |

Respondent's Exhibit C.

364 18.

BENEFICIARIES' SHARES OF INCOME AND CREDITS
(See Instruction 18)

| 1. NAME AND ADDRESS OF EACH BENEFICIARY (Designate nonresident aliens) | 3. DIVIDENDS (Item 7 above, or Item 17, whichever amount is smaller) | 4. BALANCE OF NET INCOME (Item 17 minus Item 7) | 5. CAPITAL NET GAIN OR LOSS (Schedule D, Column 8) | 6. INCOME TAX PAID AT SOURCE (2% of Item 3) | 7. INCOME TAX PAID FOREIGN COUNTRIES OR UNITED STATES POSSESSIONS |
|---|---|--|---|--|---|
| (a) Angier B. Duke (minor) c/o Cordella B. Robertson, c/o T. Markoe Robertson, Esq., 420 Lexington Ave. NYC. | \$ 5,369.17 | \$ 1,161.16 | | \$.10 | \$ 262.84 |
| (f) Undistributed | 104069.73 | 17294.77 | \$1295.06 loss | 1.90 | 5004.64 |
| 365 (m) TOTALS | \$100438.90 | \$18455.93 | \$1295.06 loss | \$2.— | \$5337.48 |

19. NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.
(See Instruction 19)

| 1. OBLIGATIONS OR SECURITIES | 3. INTEREST RECEIVED |
|--|----------------------|
| (a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia | \$75529.28 |
| (c) Liberty 3½% Bonds and other obligations of U. S. issued before Sept. 1, 1917, and obligations of U. S. possessions | 540.— |

Angier B. Duke Jr. U/W A. B. Duke

SALES SCHEDULE

| 366 | Date Sold | Security | Sales Price | Cost | Date acquired |
|-----|-----------|--|-------------|-------------|---------------|
| | 1/6 | 6M Board of Ext of City School Clev. Ohio. 6/38 | \$6,673.91 | \$6,915.00 | 2/26/26 |
| | | 25M Hudson Co. N. J. Jail Bonds 4½s 7/1/32 | 25,347.53 | 25,281.25 | 11/29/23 |
| | | 10M " " " Newark Tur Imp. " | 10,139.01 | 10,112.50 | " |
| | | 17M " " " b.Hospital " | 17,236.32 | 17,191.25 | " |
| | | 1M " " " Road Bonds " | 1,013.90 | 1,011.25 | " |
| | 6/12 | A. Warrant for 8 2/8 Shs. Aluminum Ltd. | 138.91 | 117.12 | 1928 |
| | 7/3 | 1M County of Hudson N. J. 4½/31 | 1,000.00 | 1,046.51 | 1926 |
| | | 3M " " " " " | 3,000.00 | 3,139.53 | " |
| | | 12M " " Duval Fla. 5/30 | 11,790.00 | 12,000.00 | " |
| | 7/1 | 6M State of Montana 5½/41 | 6,000.00 | 6,322.50 | 2/26/26 |
| | 9/14 | B. Warrant for 8 Shs. Aluminum Ltd. | 94.84 | 113.57 | " |
| | 12/18 | 100 Shs. Amer. Cigar Co. Com. | 7,996.00 | 8,475.00 | 2/26/26 |
| | | | \$90,430.42 | \$91,725.48 | |
| | | | | 90,430.42 | |
| | | | Loss | \$1,295.06 | |

Respondent's Exhibit D.**FIDUCIARY RETURN OF INCOME**

367

FOR CALENDAR YEAR 1931

File This Return Not Later Than the 15th Day of the Third Month
Following the Close of the Taxable Year

File Code 701
Serial Number 053905
District 2—N. Y.

Name of Estate or Trust

TTEE. ANTHONY NEWTON DUKE U/W A. B. DUKE

#0037—P85

Name and Address of Fiduciary

CITY BANK FARMERS TRUST CO.
22 WILLIAM ST. NEW YORK CITY

368

Item and
Instruc-
tion No.

INCOME

- | | | |
|---|-------------|-----------|
| 2. Interest on Bank Deposits, Notes, and Corpora- tion Bonds, etc. (except interest on tax-free covenant bonds) | \$ 523.83 | |
| 3. Interest on Tax-free Covenant Bonds upon which a tax was paid at source | 100.00 | |
| 6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C) Schedule "D" Loss | 872.61 loss | |
| 7. Dividends on Stock of Domestic Corporations | 109,443.90 | |
| 8. Other Income (including dividends on stock of foreign corporations). (State nature of income) | | |
| (a) Dividends British American Tobacco & Tobacco Securities Trust Ltd. Net | 17533.97 | |
| British Tax withheld | 5357.48 | 22,891.45 |

369

9. TOTAL INCOME IN ITEMS 1 TO 8

\$132,086.57

DEDUCTIONS

- | | |
|--|-------------|
| 11. Taxes Paid N. Y. State Income Tax on 1930 (Undistributed) | \$ 5,203.96 |
| 15. Other Deductions Authorized by Law. (Ex- plain in Schedule E) | 5.50 |

16. TOTAL DEDUCTIONS IN ITEMS 10 TO 15

5,209.46

17. NET INCOME (Item 9 minus Item 16)

\$126,877.11

Respondent's Exhibit D.

370 18.

BENEFICIARIES' SHARES OF INCOME AND CREDITS

(See Instruction 18)

| 1. NAME AND ADDRESS OF EACH BENEFICIARY (Designate nonresident aliens) | 3. DIVIDENDS (Item 7 above, or Item 17, whichever amount is smaller) | 4. BALANCE OF NET INCOME (Item 17 minus Item 7) | 5. CAPITAL NET GAIN OR LOSS (Schedule D, Column 8) | 6. INCOME TAX PAID AT SOURCE (2% of Item 3) | 7. INCOME TAX PAID FOREIGN COUNTRIES OR UNITED STATES POSSESSIONS |
|--|--|---|--|---|---|
| (a) Anthony N. Duke (Minor) c/o Cordelia B. Robertson, Gdn., c/o T. Markoe Robertson, Esq., 420 Lexington Ave. NYC. | \$ 5388.28 | \$ 1157.47 | | \$.10 | \$ 263.77 |
| (g) Undistributed | 104055.62 | 17148.35 | \$872.61 | loss 1.90 | 5093.71 |
| (m) TOTALS | \$109443.90 | \$18305.82 | \$872.61 | loss 2.00 | \$5357.48 |

371

19.

NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

(See Instruction 19)

| 1. OBLIGATIONS OR SECURITIES | 3. INTEREST RECEIVED |
|--|----------------------|
| (a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia | \$74978.36 |
| (c) Liberty 3½% Bonds and other obligations of U. S. issued before Sept. 1, 1917, and obligations of U. S. possessions | 540.00 |

Anthony Newton Duke U/W A. B. Duke

SALES SCHEDULE

| Date Sold | Security | Sales Price | Cost | Date acquired |
|-----------|---|-------------|-------------|---------------|
| 1/6 | 25M Hudson County N. J. County Jail 4½/33 | \$25,458.66 | \$25,281.25 | 11/29/26 |
| | 13M Hudson County N. J. Hospital 4½/31 | 13,238.50 | 13,146.25 | " |
| | 15M Hudson County N. J. Nwk. Tpke Impr. 4½/1933 | 15,275.20 | 15,168.75 | " |
| | 6M Bd of Ed. Cleveland, Ohio. 6/38 | 6,673.62 | 6,915.00 | 2/26/26 |
| 6/12 | A. Warrants for 8 4/8 Shs Aluminum Ltd. | 143.12 | 120.67 | 1928 |
| 7/3 | 12M County of Duval Fla. 5/50 | 11,790.00 | 12,000.00 | 2/26/26 |
| 7/1 | 6M State of Montana 5½/41 | 6,000.00 | 6,322.50 | " |
| 9/14 | B. Warrant For 8 Shares Aluminum Ltd. | 94.98 | 113.57 | 1928 |
| 12/18 | 100 Shs. Amer. Cigar Co. Com. | 7,996.00 | 8,475.00 | 1926 |
| | | \$86,670.38 | \$87,542.90 | |
| | | | 86,670.38 | |
| | | Loss ... | \$ 872.61 | |

Petitioners' Exhibit 1.

TRUSTEE U/W ANGIER B DUKE

ANTHONY NEWTON DUKE

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|-------------------|------------|------------|------------|---------------------|
| | 1930 | | | | | | |
| | Dec 31 | Balance Forwarded | | 607,392.03 | 594,244.66 | 13,147.37 | 13,147.37 |
| | 1931 | | | | | | |
| 0037 P | Jan 16 | Sold 25M Hud Co N J Co Jail Bond 4½s due 7/1/33 3½ basis less ½ net & int | | | 25,458.06 | | |
| " | | Sold \$13000 Hud Co N J Hosp for Insane 4½s due 7/1/33 3½ basis less ½ net & int | | | 13,238.50 | | |
| " | | Sold 15M Hud Co N J Newark Turnpike Imp 4½s due 7/1/33 3½ basis less ½ net & int | | | 15,275.20 | | |
| " | | Sold 6M Bd of Education of City School Dist of City of Cleve Ohio Bldg Bds 6s due 6/1/38 dated 6/1/20 4 10 basis less ¾ net & int | | | 6,073.92 | 47,498.91 | 47,498.91 |
| 0037 P | 20 | Trsf'd fr Inc a/c as above per proof of cash | | | | | |
| | | As of 11/15/26 cost of 100M State of N J | | | 101,596.44 | | |
| | | As of 11/23/26 50M | | | 50,750.00 | | |
| | | As of 11/17/26 20M City of Det | | | 20,500.62 | | |
| | | As of 8/11/29 76M Co of Hud | | | 76,902.40 | | |
| | | As of 8/27/29 19M City of Cleve | | | 19,000.00 | | |
| | | As of 8/3/29 20M City of Richmon | | | 20,249.97 | | |
| | | As of 9/6/29 30M State of Maine | | | 29,403.32 | | |
| | | As of 10/1/29 540 shrs Duke Pr Co | | | 54,000.00 | | |
| | | As of 11/30/26 cost of Trsf Stamps | | | 1.00 | 419,902.66 | 419,902.66 |
| " | | Trsf'd to Inc a/c as above per proof of cash | | | | | |
| | | As of 2/27/20 recd fr Est A B Duke | | 250,000.00 | | | |
| | | As of 9/5/29 proceeds sale Duke Pr Rts | | 2,049.80 | | | |
| | | " | | 6,599.40 | | | |
| | | " | | 19,698.20 | | | |
| | | " | | 4,187.10 | | | |
| | | " | | 39,833.90 | | | |
| | | " | | 5,861.90 | | | |
| | | 9/6/29 | | 10,948.80 | | | |
| | | 9/10/29 | | 1,888.05 | | | |
| | | " | | 21,447.60 | | | |
| | | 4/21/26 cost of Trsf Stamps | | .84 | | | |
| | | 3/15/28 | | 2.84 | | | |
| | | 4/28/26 proceeds sale Amer Mach Rts | | 112.50 | | | |
| | | 4/11/27 proceeds sale Gty Tr Co | | 4,339.79 | | | |
| | | 4/5/29 proceeds sale Texas Corp | | 13,134.70 | | 39,797.24 | 39,797.24 |
| 0037 P | 20 | Pd C B F T Co being comm for receiving \$3,844,063.23 & paying out \$12,806.75 of princ per Dec et 1/2/31 | | 38,641.71 | | | |
| " | | Pd T B C & M being prop shr of costs & disb as taxes per Dec 1/2/31 | | 30.53 | | 1,125.00 | 1,125.00 |
| 0037 P | May 28 | Cost of ins \$7.40 and postage 11¢ on 74M City of Phil 4½s | | 7.51 | | 1,117.49 | 1,117.49 |
| 0037 P | May 29 | To cover registered mail charge in connection with exchange 74M City of Phil | | 1.68 | | 1,115.81 | |

Petitioners' Exhibit 1.

12

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|---------|---|----------------|-----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | May 29 | Balance Brought Forward | | | | 1,115.81 | 1,115. |
| 9037 P | June 10 | Cost of Fed Stamps for tfr of 64 Rts Aluminum Ltd A Rts | | .16 | | 1,115.65 | 1,115. |
| 9037 P | June 12 | Sold A Warrant for 84/8 shares Aluminum Ltd 8 at 17 less bk & tax 4 Rts at 2 net less tax | | | 143.12 | 1,258.77 | 1,258. |
| 9037 P | Jul 1 | Red 6M State of Montana | | | 6,000.00 | 7,258.77 | 7,258. |
| 9037 P | Jul 3 | Sold 12M County of Duval of Florida Spl School Dist No. 1 of Duval County 5% Bonds due 4/1/50 98 1/4 net and int | | | 11,700.00 | 19,048.77 | 19,048. |
| 9037 P | Jul 6 | Bt 18M City of Phil 4s due 2/1/53 3 85 basis less 1/4 net and int | | 18,370.31 | | 678.46 | 678. |
| 9037 P | Sep 15 | Warrant 8 sh Aluminum Ltd 7 at 12 less bkge & tax 1 at 12 net less tax | | | 94.98 | 773.44 | 773. |
| 9037 P | Dec 17 | Sold 100 shs American Cigar Co Com | | | 7,906.00 | 8,709.44 | 8,709. |
| | 1932 | | | | | | |
| 9037 P | Jan 4 | Bought \$5000 State of New Jersey 4 1/4% 7/1/40 4 40% basis net & int | | 4,947.32 | | 3,822.12 | 3,822. |
| 9037 P | Jan 8 | Bt \$3000 City of St Paul Minn 4 1/2s due Nov 1 1932 \$4.85 basis net & int | | 2,863.16 | | 958.96 | 958. |
| 9037 P | Jul 7 | Bt \$12000 State of Minnesota 4 1/4% due 6/1/40 99 3/4 net & int | | 11,970.00 | | 11,011.04 | 11,011. |
| 9037 P | Jul 21 | Sold \$12M State of Minnesota 4 1/4% due 6/1/40 99 3/4 net & int/ to reverse entry of 7/7/32/ | | | 11,970.00 | 958.96 | 958. |
| 9037 P | Sep 10 | Recd from execs Est Angier B Duke being 1/2 shr in proceeds sale 2 tickets Natl Mens Championship West Side Tennis Club | | | 3.75 | 962.71 | 962. |
| 9037 P | 23 | Subscription Warrants to subscribe to 7 shrs Aluminum Co Com Ltd Series C 1 at 5 6 at 6 1/2 less bkge & tax | | | 43.20 | 1,005.91 | 1,005. |
| | 1933 | | | | | | |
| 9037 P | Mar 13 | Paid Coll of Int Rev payment of 1932 Fed Inc Tax on accretions to princ | | 10.73 | | 995.18 | 995. |
| 9037 P | Apr 3 | 18 3/4 shrs Durham Cotton Manufacturing Co Cap Retirement at 50.00 per shr 937.50 Less Coll Charges 1/10 of 1% .94 | | | 936.56 | 1,931.74 | |

Forwarded to Sheet 9

Petitioners' Exhibit 2.

TTEE U/W ANGIER B DUKE

ANTHONY NEWTON DUKE

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|-------|---|----------------|------------|------------|-----------|------------------|
| | 1930 | Balance Forwarded | | 821,989.98 | 852,201.07 | 30,211.09 | 30,211.09 |
| 9037 I | Dec 1 | Divd 1500 Liggett & Myers Tob Co Com | 6 | | 1,500.00 | | |
| " | | Divd 1100 Liggett & Myers Tob Co Com B | 6 | | 1,100.00 | 32,811.09 | 32,811.09 |
| 9037 O | | Regd 10M City of Cleve | 7 | | 225.00 | | |
| " | | Regd 9M City of Cleve | 7 | | 202.50 | 33,239.19 | 33,239.19 |
| 9037 I | | Ex Divd 1875 shrs Ame Machine & Foundry Co Com | 6 | | 375.00 | 33,614.19 | 33,614.19 |
| 9037 I | 11 | Pd Coll Int Rev 4th quart install 1929 | | | | | |
| | | Fed Inc Tax on undistributed inc | | 5,253.42 | | 28,360.77 | 28,360.77 |
| 9037 I | 13 | Divd 1750 Tob Sec Tr Co Ltd | 6 | | 802.50 | | |
| " | | Divd 1750 Tob Sec Tr Co Ltd | 6 | | 222.25 | 29,475.52 | 29,475.52 |
| 9037 I | 15 | Divd 87 Stand Oil Ind | 6 | | 54.69 | | |
| " | | 8M Co of Fairfax Va | 7 | | 200.00 | | |
| " | | 2M City of Newark N J | 7 | | 42.50 | | |
| " | | 9M City of Newark N J | 7 | | 191.25 | | |
| " | | 14M City of Newark N J | 7 | | 297.50 | | |
| " | | 40M City of Det Mich | 7 | | 850.00 | | |
| " | | 20M City of Det Mich | 7 | | 450.00 | 31,561.46 | 31,561.46 |
| 9037 I | 18 | Bought 25M City of Det Mich 4 1/8 due 12/15/43 90% net & int | | 24,906.25 | | | |
| " | | Accd int 12/15 to 12/18 on above | | 8.86 | | 6,046.35 | 6,046.35 |
| 9037 I | 24 | Int to 11/26/30 inc princ | | | 209.48 | | |
| | | | | | 1.26 | 6,857.00 | 6,857.00 |
| 9037 I | 30 | Coll chg ded on cpas aggregating \$980 of Co of Westchester | | .24 | | 6,856.85 | 6,856.85 |
| 9037 | | Coll chg ded on cpas aggregating \$1020 of City of Newark N J | | .25 | | 6,856.60 | 6,856.60 |
| 9037 I | 31 | Divd 31 Gty Tr Co | 6 | | 153.00 | 7,011.60 | 7,011.60 |
| 9037 I | | Divd 125 Durham & So Ry Co | 6 | | 312.50 | 7,324.10 | 7,324.10 |
| 9037 I | Jan 2 | 12M Wash Md | 7 | | 270.00 | | |
| " | | 50M State of W Va | 7 | | 1,000.00 | | |
| " | | 16M State of W Va | 7 | | 340.00 | | |
| " | | 9M " | 7 | | 191.25 | | |
| " | | 59M State of Tenn | 7 | | 1,327.50 | | |
| " | | 6M State of No Car | 7 | | 135.00 | | |
| " | | 25M State of No Car | 7 | | 562.50 | | |
| " | | 6M State of Montana | 7 | | 163.00 | | |
| " | | 12M Spokane Co Wash | 7 | | 283.00 | | |
| " | | 2M Middlesex Co N J | 7 | | 42.50 | | |
| " | | 1M Hud Co N J | 7 | | 222.50 | | |
| " | | 2M " | 7 | | 45.00 | | |
| " | | 14M " | 7 | | 315.00 | | |
| " | | 15M Hud Co | 7 | | 337.50 | | |
| " | | 2M " | 7 | | 45.00 | | |
| " | | 17M " | 7 | | 382.50 | | |
| " | | 25M " | 7 | | 562.50 | | |
| " | | 12M Ea Bay Municipal Utility Dist Cal | 7 | | 300.00 | | |
| " | | 10M Co of Sumter S C | 7 | | 250.00 | | |
| " | | 20M City of Richmond Va | 7 | | 450.00 | | |
| " | | 1M " | 7 | | 22.50 | 14,375.35 | |
| Forwarded | | | | 852,150.00 | 806,534.35 | 14,375.35 | |

Petitioners' Exhibit 2.

12

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|-------|--|----------------|------------|------------|------------|------------------|
| | 1931 | | | | | | |
| | Jan 2 | Balance Forwarded | | 852,159.00 | 866,534.35 | 14,375.35 | 14,375.35 |
| 9037 I | Jan 2 | 11M City of Richmond Va | 7 | | 247.50 | | |
| " | | 38M City of Phila | 7 | | 807.50 | | |
| " | | 20M City of Phila | 7 | | 425.00 | | |
| " | | 8M City of Phila | 7 | | 160.00 | | |
| " | | 2M City of Milw | 7 | | 45.00 | | |
| " | | 57M City of Milw | 7 | | 1,282.50 | | |
| " | | 23M City of Memphis Tenn | 7 | | 575.00 | | |
| " | | 1M " | 7 | | 23.75 | | |
| " | | 1M " | 7 | | 25.00 | | |
| " | | 20M City of Kansas City Mo | 7 | | 450.00 | | |
| " | | 10M " | 7 | | 225.00 | | |
| " | | 12M City of Greenville S C | 7 | | 270.00 | | |
| " | | 12M City of Dubuque Iowa | 7 | | 270.00 | | |
| " | | 12M City of Detroit Mic | 7 | | 270.00 | 19,451.60 | 19,451.60 |
| 9037 I | | Regd 12M State of Cal | 7 | | 240.00 | 19,691.60 | 19,691.60 |
| 9037 I | | 165M State of N J | 7 | | 3,500.25 | | |
| " | | 10M State of N J | 7 | | 212.50 | 23,410.35 | 23,410.35 |
| 9037 I | | 11658 62/100 shrs Duke Pr Co | 6 | | 14,572.50 | 37,982.85 | 37,982.85 |
| 9037 I | | Divd 1629 3/5 U S Tob Co Com | 6 | | 1,629.00 | 39,611.85 | 39,611.85 |
| 9037 I | | Divd 907 Cannon Mills Co Com | 6 | | 308.80 | 40,010.65 | 40,010.65 |
| 9037 I | | Divd 3300 Texas Corp | 6 | | 2,475.00 | 42,485.65 | 42,485.65 |
| 9037 I | | Divd 603 Aluminum Co of Amer Pfd | 6 | | 904.50 | 43,390.15 | 43,390.15 |
| " | | Divd 25 Erwin Cotton Mills Co Pfd | 6 | | 75.00 | 43,465.15 | 43,465.15 |
| 9037 I | | Divd 594 Lehigh Valley Coal Corp Pfd | 6 | | 445.50 | | |
| " | | Divd 1258 Durham Hold Corp Com | 6 | | 1,258.00 | | |
| " | | Divd for Oct | 6 | | 1,258.00 | 46,426.65 | 46,426.65 |
| 9037 I | 12 | 125 shrs Piedmont & No Ry Co | 6 | | 156.25 | 46,582.90 | 46,582.90 |
| 9037 I | 15 | 2M City of Troy N Y | 8 | | 40.00 | | |
| " | | 3M " | 8 | | 60.00 | | |
| " | | 3M " | 8 | | 60.00 | | |
| " | | 2M " | 8 | | 40.00 | | |
| " | | 2M " | 8 | | 40.00 | 46,822.90 | 46,822.90 |
| 9037 I | 16 | Accd Int 1/1 to 1/16 on 25M Hud Co N J | 7 | | 46.88 | | |
| " | | Accd Int 1/1 to 1/16 on 13M Hud Co N J | 7 | | 24.37 | | |
| " | | Accd Int 1/1 to 1/16 on 15M Hud Co N J | 7 | | 28.13 | | |
| " | | Accd Int 12/1 to 1/16 on 6M Bd of Education City of Cleve O | 7 | | 45.00 | 46,967.28 | 46,967.28 |
| 9037 I | 20 | Trsfld to princ a/c above per proof of cash As of 11/15/26 cost of 100M State of N J | | | | | |
| | | 11/17/26 cost of 20M City of Detroit | | | 101,596.44 | | |
| | | 11/23/26 cost of 50M State of N J | | | 20,500.62 | | |
| | | 8/3/29 cost of 76M Co of Hud | 27 | | 50,750.00 | | |
| | | 8/27/29 19M City of Cleve | | | 76,902.40 | | |
| | | 8/3/29 20M City of Richmond V | | | 19,000.00 | | |
| | | 9/6/29 30M State of Maine | | | 20,249.97 | | |
| | | 10/1/29 540 shrs Duke Pr Co | | | 29,403.32 | | |
| | | 11/30/26 traf stamps | 27 | | 54,000.00 | | |
| | | | | 1.00 | | 325,436.47 | |

Forwarded to Sheet 37

Petitioners' Exhibit 2.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|--------------|--|------------|------------------|
| | 1931 | | | 1,224,562.75 | 899,126.28 | | |
| | Jan 20 | Balance Brought Forward | | | | 325,436.47 | 325,436.47 |
| 037 I | Jan 20 | Trsf'd fr princ a/c as above per proof of chg as of 2/27/26 rec'd fr Est A B Duke As of 9/5/29 proceeds sale Duke Pr Rts | | | 250,000.00 2,049.80 6,509.40 19,698.20 4,187.10 39,833.90 5,861.90 10,948.80 1,888.05 21,447.60 .84 2.84 112.50 4,339.79 13,134.70 | | |
| | | 9/6/29 | 12 | | | 54,068.95 | 54,068.95 |
| | | 9/10/29 | | | | 54,068.70 | 54,068.70 |
| | | 4/21/26 cost of trsf stamps | | | | | |
| | | 3/15/28 cost of trsf stamps | | | | | |
| | | 4/28/26 proceeds sale Amer Mach Rts | | | | | |
| | | 4/11/27 " Gty Tr Co | | | | | |
| | | 1/5/29 " Texas Corp | | | | | |
| 037 I | 26 | Coll chg ded on \$807.50 City of Phila cpns | 23 | .25 | | 54,068.70 | 54,068.70 |
| 037 I | 27 | Coll chg ded on \$3718.75 State of N J | 23 | .38 | | | |
| " | | Coll chg ded on \$270 City of Dubuque cpns | 23 | .70 | | 54,067.62 | 54,067.62 |
| 037 I | 28 | Coll chg ded on \$1710 Hud Co cpns | 23 | .28 | | 54,067.34 | 54,067.34 |
| 037 I | | Divd 14000 British Amer Tob Co Ltd Final 1106 13 4 | | | | | |
| | | Interim 583 6 8 at 4 854073 | 3 | | 8,494.62 | 63,161.96 | 63,161.96 |
| 037 I | 31 | Check to Cordella Biddle Robertson gen gdn Anthony Newton Duke amt due for support maintenance & education of Anthony Duke | 27 | 2,500.00 | | 60,661.96 | 60,661.96 |
| 037 I | | Divd 125 Durham & So Ry Co | 6 | | 1,250.00 | 61,911.96 | 61,911.96 |
| 037 I | Feb 2 | 30M City of Trenton N J | 7 | | 637.50 | | |
| " | | 25M City of Detroit | 7 | | 562.50 | 63,111.96 | 63,111.96 |
| 037 I | | 1875 Amer Machine & Fdry Co Com | 6 | | 656.25 | 63,768.21 | 63,768.21 |
| 037 I | 6 | Divd 728 Erwin Cotton Mills Co Com | 6 | | 1,092.00 | 64,860.21 | 64,860.21 |
| 037 I | 27 | Coll chg ded on \$637.50 City of Trenton N J | 23 | .22 | | 64,859.99 | 64,859.99 |
| 037 I | Mar 2 | 30M State of Maine | 7 | | 600.00 | | |
| " | | 6M Co of Guilford N C | 7 | | 157.50 | | |
| " | | 2M City of Toledo Ohio | 7 | | 45.00 | | |
| " | | 2M City of Toledo | 7 | | 45.00 | | |
| " | | 5M City of Toledo | 7 | | 112.50 | | |
| " | | 5M City of Toledo | 7 | | 112.50 | | |
| " | | 3M City of Toledo | 7 | | 67.50 | | |
| " | | 16M City of Toledo | 7 | | 360.00 | | |
| " | | 16M City of Toledo | 7 | | 360.00 | | |
| " | | 15M City of Oklahoma | 7 | | 375.00 | | |
| " | | 25M City of Nash Tenn | 7 | | 625.00 | | |
| " | | 27M City of Minn Minn | 7 | | 540.00 | | |
| " | | 25M City of Minn | 7 | | 500.00 | | |
| " | | 19M City of Minn | 7 | | 380.00 | | |
| " | | 4M City of Los Angeles | 7 | | 95.00 | 69,234.99 | |

Petitioners' Exhibit 2.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|---|----------------|-----------|----------|-----------|------------------|
| | 1931 | | | | | | |
| | Mar 2 | Balance Brought Forward | | | | 69,234.99 | 69,234.99 |
| 9037 I | Mar 2 | 2M City of Los Angeles | 7 | | 47.50 | | |
| " | | 40M City of Cleve | 7 | | 900.00 | | |
| " | | 20M City of Balt | 7 | | 400.00 | 70,582.49 | 70,582.49 |
| 9037 I | | Divd 4100 Liggett & Myers Tob Co Com B | 6 | | 1,100.00 | | |
| " | | Extra Divd " | 6 | | 1,100.00 | | |
| " | | Divd 1500 Liggett & Myers Tob C3 Com | 6 | | 1,500.00 | | |
| " | | Extra Divd " | 6 | | 1,500.00 | 75,782.49 | 75,782.49 |
| 9037 I | Mar 13 | Reed from Estate of Angler B Duke being 6 months int 2/28/31 on 55M New York City 4 1/4s held by N Y State Tax Comm | 8 | | 584.37 | 76,366.86 | 76,366.86 |
| 9037 I | Mar 16 | Divd 87 Stand Oil Co of Ind Cap | 6 | | 43.50 | 76,410.36 | 76,410.36 |
| 9037 I | Mar 17 | Paid Coll Int Rev 1930 Income Tax 1st quarterly installment on Undistributed Income | 27 | 4,535.19 | | 71,875.17 | 71,875.17 |
| 9037 I | Mar 17 | Aced int fr 2/27/31 to 3/17/31 60M City of Phil Pa 4 1/4s due 2/27/81/51 | 23 | 127.50 | | | |
| | | Bought 60M City of Phil Pa 4 1/4s due 2/27/81/51 103% net & bkge | 27 | 62,025.00 | | 9,722.67 | 9,722.67 |
| 9037 I | Mar 17 | Aced int fr 2/27/31 to 3/17/31 14M City of Phil Pa 4 1/4s due 2/27/81/51 | 23 | 29.75 | | | |
| | | Bought 14M City of Phil Pa 4 1/4s due 2/27/81/51 103% net & bkge | 27 | 14,472.50 | | 4,779.58 | 4,779.58 |
| 9037 I | Mar 31 | Divd 31 Guaranty Tr Co | 6 | | 155.00 | 4,624.58 | 4,624.58 |
| 9037 I | Mar 31 | Divd 14000 British Amer Tobacco Co Ltd L 583 6 8 4 85 1/2 | 3 | | 2,832.10 | 1,792.48 | 1,792.48 |
| 9037 I | Apr 1 | 5M State of Oregon | 7 | | 112.50 | | |
| " | | 3M " | 7 | | 67.50 | | |
| " | | 4M " | 7 | | 90.00 | | |
| " | | 2M Hudson & Manhattan RR Co | 1 | | 50.00 | | |
| " | | 15M Erie County N Y | 8 | | 318.75 | | |
| " | | 6M County of Erie N Y | 8 | | 127.50 | | |
| " | | 19M County of Erie N Y | 8 | | 403.75 | | |
| " | | 12M County of Duval Fla | 7 | | 300.00 | | |
| " | | 25M City of Yonkers N Y | 8 | | 562.50 | | |
| " | | 8M City of Summit N J | 7 | | 160.00 | | |
| " | | 1M City of Summit N J | 7 | | 20.00 | | |
| " | | 1M " | 7 | | 20.00 | | |
| " | | 2M " | 7 | | 40.00 | | |
| " | | 2M " | 7 | | 40.00 | | |
| " | | 2M " | 7 | | 40.00 | | |
| " | | 10M City of Buffalo N Y | 8 | | 212.50 | | |
| " | | 6M City of Balt Md | 7 | | 120.00 | | |
| " | | 1M City of Asheville | 7 | | 23.75 | 916.27 | |

Petitioners' Exhibit 2.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Apr 1 | Balance Brought Forward | | | | 916.27 | 916.27 |
| 9037 I | Apr 1 | 5M City of Asheville | 7 | | 118.75 | | |
| " | | 5M City of Asheville | 7 | | 118.75 | | |
| " | | 1M " | 7 | | 23.75 | 1,177.52 | 1,177.52 |
| 9037 I | Apr 1 | Divd 3300 Texas Corp | 6 | | 2,475.00 | | |
| " | | Divd 1258 Durham Holding Corp | 6 | | 1,258.00 | | |
| " | | Divd 594 Lehigh Valley Coal Corp Pfd | 6 | | 445.50 | | |
| " | | Divd 11658 62/100 Duke Power Co Cap | 6 | | 14,572.50 | 19,928.52 | 19,928.52 |
| 9037 I | Apr 1 | Cost of ins 5.25 and postage 25¢ on talons 2 for 14M sh British American Tob Co Ltd | 22 | 5.50 | | 19,923.02 | 19,923.02 |
| 9037 I | Apr 1 | 1629 3/5 U S Tobacco Co Com | 6 | | 1,791.90 | | |
| " | | Divd 997 Cannon Mills Co Com | 6 | | 398.80 | | |
| " | | Divd 603 Aluminum Co of America Pfd | 6 | | 904.50 | 23,018.22 | 23,018.22 |
| 9037 I | Apr 1 | Divd 125 Durham & Southern Ry Co | 6 | | 312.50 | 23,330.72 | 23,330.72 |
| 9037 I | Apr 13 | Divd 125 Piedmont & Northern Rwy Co Cap | 6 | | 156.25 | 23,486.97 | 23,486.97 |
| 9037 I | Apr 14 | Paid Dept of Taxation and Finance 1930 New York State Tax on Undistributed Income | 20 | 5,203.96 | | 18,283.01 | 18,283.01 |
| 9037 I | Apr 15 | 12M City of N Y | 8 | | 255.00 | 18,538.01 | 18,538.01 |
| 9037 I | Apr 23 | Charges incurred on the collection of 531.25 coupons County of Erie | 23 | 22 | | 18,537.79 | 18,537.79 |
| 9037 I | Apr 24 | Charges incurred collection \$562.50 coupons City of Yonkers | 24 | 23 | | 18,537.56 | 18,537.56 |
| 9037 I | Apr 30 | Paid Cordelia Biddle Robertson gen gdn An- thony Newton Duke | 27 | 2,500.00 | | 16,037.56 | 16,037.56 |
| 9037 I | Apr 30 | 12M County of Georgetown S C | 7 | | 300.00 | 16,397.56 | 16,397.56 |
| 9037 I | May 1 | 12M Washington Md | 7 | | 270.00 | | |
| " | | 8M Town of Kearney | 7 | | 180.00 | | |
| " | | 1M " | 7 | | 22.50 | | |
| " | | 3M " | 7 | | 67.50 | | |
| " | | 4M Mayor & Council of Wilmington Del | 7 | | 90.00 | | |
| " | | 8M " | 7 | | 180.00 | | |
| " | | 6M Fed Ld Bk of New Orleans | 9 | | 135.00 | | |
| " | | 6M Fed Ld Bk of Houston | 9 | | 135.00 | | |
| " | | 5M City of Hartford Conn | 7 | | 106.25 | | |
| " | | 30M City of Hartford Conn | 7 | | 637.50 | | |
| " | | 14M " | 7 | | 297.50 | | |
| " | | 10M City of Jersey City N J | 7 | | 225.00 | 18,743.81 | |

Petitioners' Exhibit 2.

13

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|---------|---|-------------------|----------|----------|-----------|---------------------|
| | 1931 | | | | | | |
| | May 1 | Balance Brought Forward | | | | 18,743.81 | 18,743.81 |
| 9037 I | May 1 | 25M City of Norfolk Va | 7 | | 625.00 | 19,368.81 | 19,368.81 |
| 9037 I | May 1 | 1875 Amer Machine & Foundry Co Com | 6 | | 656.25 | 20,025.06 | 20,025.06 |
| 9037 I | May 15 | 7M Hudson County N J | 7 | | 157.50 | | |
| " | " | 10M " | 7 | | 225.00 | | |
| " | " | 18M City of Newark N J | 7 | | 382.50 | | |
| " | " | 10M City of Newark N J | 7 | | 212.50 | | |
| " | " | 10M " | 7 | | 212.50 | | |
| " | " | 10M " | 7 | | 212.50 | | |
| " | " | 10M City of Detroit Mich | 7 | | 212.50 | 21,640.06 | 21,640.06 |
| 9037 I | May 21 | Divd 1750 Tob Sec Tr Co | 3 | | 332.50 | 21,972.56 | 21,972.56 |
| 9037 I | May 25 | Charges incurred coll \$1041.25 coupons City of Hartford Conn | 23 | 330 | | | |
| " | " | Charges incurred coll \$250 coupons City of Wilmington Del | 23 | 20 | | 21,971.97 | 21,971.97 |
| 9037 I | June 1 | 16M Westchester County N Y | 8 | | 320.00 | | |
| " | " | 13M " | 8 | | 260.00 | | |
| " | " | 6M Miami Conservancy Dist | 7 | | 165.00 | | |
| " | " | 3M County of Westchester N Y | 8 | | 67.50 | | |
| " | " | 20M County of " | 8 | | 400.00 | | |
| " | " | 7M " | 8 | | 157.50 | | |
| " | " | 12M County of Mecklenburg N C | 7 | | 285.00 | | |
| " | " | 50M City of N Y | 8 | | 1,062.50 | | |
| " | " | 15M City of Detroit | 7 | | 318.75 | 25,008.22 | 25,008.22 |
| 9037 I | June 1 | 1500 shs Liggett & Myers Tobacco Co Com | 6 | | 1,500.00 | 26,508.22 | 26,508.22 |
| 9037 I | June 1 | Int regd 9M City of Cleve Ohio | 7 | | 202.50 | | |
| " | " | Int regd 10M City of " | 7 | | 225.00 | 26,935.72 | 26,935.72 |
| 9037 I | June 1 | Divd 1100 Liggett & Myers Tobacco Co | 6 | | 1,100.00 | 28,035.72 | 28,035.72 |
| 9037 I | June 12 | Paid Coll Int Rev 2nd Qtr Install 1930 Fed Income Tax on Undist Income | 27 | 4,535.19 | | 23,500.53 | 23,500.53 |
| 9037 I | June 15 | 8M County of Fairfax Va | 7 | | 200.00 | | |
| " | " | 2M City of Newark N J | 7 | | 42.50 | | |
| " | " | 9M City of Newark N J | 7 | | 191.25 | | |
| " | " | 14M City of Newark N J | 7 | | 297.50 | | |
| " | " | 40M City of Detroit Mich | 7 | | 850.00 | | |
| " | " | 25M City of Detroit Mich | 7 | | 531.25 | | |
| " | " | 20M City of Detroit Mich | 7 | | 450.00 | 26,063.03 | 26,063.03 |
| 9037 I | June 15 | 87 sh Std Oil Co of Indiana Cap | 6 | | 43.50 | 26,106.53 | 26,106.53 |

Forwarded Sheet 41

Petitioners' Exhibit 2.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|---------|--|----------------|-------|----------|-----------|------------------|
| | 1931 | | | | | | |
| | June 15 | Balance Brought Forward | | | | 26,106.53 | 26,106.53 |
| 9037 I | June 19 | Int on a/c to 5/22/31 | | | 237.60 | 26,344.13 | 26,344.13 |
| 9037 I | June 25 | Charges incurred coll \$1020 Newark N J coupons | 23 | .24 | | | |
| " | | Charges incurred coll \$580 Westchester County N Y coupons | 24 | .23 | | 26,343.66 | 26,343.66 |
| 9037 I | June 30 | 12M Washington Md | 7 | | 270.00 | | |
| " | | 50M State of West Va | 7 | | 1,000.00 | | |
| " | | 16M State of West Va | 7 | | 340.00 | | |
| " | | 9M State of West Va | 7 | | 191.25 | | |
| " | | 59M State of Tenn | 7 | | 1,327.50 | | |
| " | | 6M State of North Carolina | 7 | | 135.00 | | |
| " | | 25M State of North Carolina | 7 | | 562.50 | | |
| " | | 165M State of N J | 7 | | 3,506.25 | 33,676.16 | 33,676.16 |
| 9037 I | June 30 | 10M State of N J | 7 | | 212.50 | | |
| " | | 6M State of Montana | 7 | | 165.00 | | |
| " | | 12M Spokane County State of Wash | 7 | | 285.00 | | |
| " | | 2M Middlesex County N J | 7 | | 42.50 | | |
| " | | 1M Hudson County N J | 7 | | 22.50 | | |
| " | | 2M " | 7 | | 45.00 | | |
| " | | 14M " | 7 | | 315.00 | | |
| " | | 2M " | 7 | | 45.00 | | |
| " | | 4M Hudson County N J | 7 | | 90.00 | | |
| " | | 12M East Bay Municipal Utility Dist of Cal | | | 300.00 | | |
| " | | 10M Couty of Sumter S C | 7 | | 250.00 | | |
| " | | 20M City of Richmond Va | 7 | | 450.00 | | |
| " | | 1M City of " | 7 | | 22.50 | | |
| " | | 11M " | 7 | | 247.50 | | |
| " | | 38M City of Phil Pa | 7 | | 807.50 | | |
| " | | 20M " | 7 | | 425.00 | | |
| " | | Int 4 mos 2 days \$74M City of Phil Pa | 7 | | 1,005.00 | | |
| " | | 8M City of Phil Pa | 7 | | 100.00 | | |
| " | | 2M City of Milw Wise | 7 | | 45.00 | | |
| " | | 57M " } | 7 | | 1,262.50 | | |
| " | | 23M City of Memphis Tenn | 7 | | 575.00 | | |
| " | | 1M " | 7 | | 23.75 | | |
| " | | 1M " | 7 | | 25.00 | | |
| " | | 20M City of Kansas City Missouri | 7 | | 450.00 | | |
| " | | 10M " | 7 | | 225.00 | | |
| " | | 12M City of Greenville S C | 7 | | 270.00 | | |
| " | | 12M City of Dubuque Iowa | 7 | | 270.00 | | |
| " | | 12M City of Detroit Mich | 7 | | 270.00 | 42,063.01 | 42,063.01 |
| 9037 I | Jun 30 | Divd 31 Guaranty Tr Co | 6 | | 155.00 | 42,218.01 | 42,218.01 |
| 9037 I | Jun 30 | Divd 14000 British Amer Tob Co Ltd | 3 | | 2,835.00 | 45,053.01 | |

Petitioners' Exhibit 2.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|--------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Jun 30 | Balance Brought Forward | | | | 45,053.01 | 45,053.01 |
| 9037 I | Jul 1 | Divd 594 Lehigh Valley Coal Corp Pfd | 6 | | 445.50 | 45,498.51 | 45,498.51 |
| 9037 I | Jul 1 | Int regd \$12M State of Calif | 7 | | 240.00 | 45,738.51 | 45,738.51 |
| 9037 I | Jul 1 | 1629 3/5 U S Tob Co Com | 6 | | 1,791.90 | | |
| " | | 11658 62/100 Duke Power Co Cap | 6 | | 14,572.50 | | |
| " | | 1258 Durham Hold Corp Com | 6 | | 1,258.00 | 63,360.91 | 63,360.91 |
| 9037 I | Jul 1 | 3300 Texas Corp Cap | 6 | | 1,650.00 | 65,010.91 | 65,010.91 |
| 9037 I | Jul 1 | 603 Aluminum Co of America | 6 | | 904.50 | 65,915.41 | 65,915.41 |
| 9037 I | Jul 1 | 997 Cannon Mills Co Com | 6 | | 398.80 | 66,314.21 | 66,314.21 |
| 9037 I | Jul 1 | 125 Durham & South Ry Co | 6 | | 312.50 | 66,626.71 | 66,626.71 |
| 9037 I | Jul 2 | Divd 25 Erwin Cotton Mills Co | 6 | | 75.00 | 66,701.71 | 66,701.71 |
| 9037 I | Jul 3 | Aced int fr 4/1/31 to 7/3/31 12M County of Duval of Florida 5% due 4/1/50 | 7 | | 153.34 | 66,855.05 | 66,855.05 |
| 9037 I | Jul 6 | Aced int fr 2/1/31 to 7/6/31 18M City of Phil 4s due 2/1/53 | 23 | 10.00 | | 66,845.05 | 66,845.05 |
| 9037 I | Jul 13 | 125 Piedmont & North Rwy Co Cap | 6 | | 156.25 | 67,001.30 | 67,001.30 |
| 9037 I | Jul 15 | 2M City of Troy N Y | 8 | | 40.00 | | |
| " | | 3M " | 8 | | 60.00 | | |
| " | | 3M " | 8 | | 60.00 | | |
| " | | 2M " | 8 | | 40.00 | | |
| " | | 2M " | 8 | | 40.00 | 67,241.30 | 67,241.30 |
| 9037 I | Jul 17 | Proceeds of 7/1/31 coupons detached from 12M City of Dubuque Ia 4 1/8 bds due 1/1/40 being entered on a collection basis as no funds are available | 23 | 270.00 | | 66,971.30 | 66,971.30 |
| 9037 I | Jul 20 | 12M City of Dubuque Iowa \$270.00 | 7 | | 269.30 | 67,240.60 | 67,240.60 |
| | | Less post & ins .70 | | | | | |
| 9037 I | 28 | Chgs incurred in the coll of \$1872.10 cpns of the City of Phila | 23 | .47 | | 67,240.13 | 67,240.13 |
| 9037 I | Jul 30 | Charges incurred \$517.50 County of Hudson | 23 | .22 | | | |
| " | | Charges incurred \$3718.75 State of N J | 23 | .38 | | 67,239.53 | |

Forwarded Sheet 43

Petitioners' Exhibit 2.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|-----------|--------|-----------|------------------|
| | 1931 | | | | | | |
| | Jul 30 | Balance Brought Forward | | | | 67,239.53 | 67,239.53 |
| 037 I | Jul 31 | Paid Cordella Biddle Robertson gen gdn Anthony Newton Duke | 27 | 2,500.00 | | 64,739.53 | 64,739.53 |
| 037 I | Jul 31 | Charges incurred collection \$531.25 City of Newark N J coupons | 23 | 531.25 | | 64,739.31 | 64,739.31 |
| 037 I | Aug 1 | 25M City of Detroit Mich | 7 | | 562.50 | | |
| " | | 30M City of Trenton N J | 7 | | 637.50 | 65,939.31 | 65,939.31 |
| 037 I | Aug 1 | 1875 Amer Machine & Fdry Co | 6 | | 656.25 | 66,595.56 | 66,595.56 |
| 037 I | Aug 11 | Accd int fr 4/15 to 8/11/31 10M City of Newark N J 4 1/2s due 4/15/58 | | 145.00 | | | |
| " | | Bt 10M City of Newark N J 4 1/2s due 4/15/58 3.90 basis less 1/4 net and interest | | 10,963.96 | | 55,486.60 | 55,486.60 |
| 037 I | Aug 11 | Accd int fr 3/1/31 to 8/11/31 \$20M City of Newark N J 4 1/2s due 3/1/63 | 23 | 400.00 | | | |
| " | | Bt 20M City of Newark N J 4 1/2% due 3/1/63 3.90 basis less 1/4 net and int | | 22,117.05 | | | |
| " | | Accd int fr 7/1 to 8/11/31 25M City of Trenton N J 4 1/2s | 23 | 125.00 | | | |
| " | | Bt 25M City of Trenton N J 4 1/2% due 15M due 7/1/44 10M due 7/1/45 3.90 basis net and int | 27 | 26,542.80 | | 6,301.75 | 6,301.75 |
| 037 I | Aug 11 | Accd int fr 6/1 to 8/11/31 6M City of Newark N J 4s due 6/1/56 | 23 | 46.67 | | | |
| " | | Bt 6M City of Newark N J 4s due 6/1/56 3.85 basis net and int | | 6,142.73 | | 112.35 | 112.35 |
| 037 I | Aug 20 | Charges incurred collection \$637.50 coupons City of Trenton N J | 23 | 637.50 | | 112.13 | 112.13 |
| 037 I | Sep 1 | 30M State of Maine | 7 | | 600.00 | | |
| " | | 6M County of Guilford N C | 7 | | 157.50 | | |
| " | | 3M City of Toledo Ohio | 7 | | 67.50 | | |
| " | | 16M " | 7 | | 300.00 | | |
| " | | 2M " | 7 | | 45.00 | | |
| " | | 20M City of Newark N J | 7 | | 450.00 | | |
| " | | 5M City of Toledo Ohio | 7 | | 112.50 | | |
| " | | 16M " | 7 | | 300.00 | | |
| " | | 2M " | 7 | | 45.00 | | |
| " | | 5M " | 7 | | 112.50 | | |
| " | | 15M City of Oklahoma | 7 | | 375.00 | | |
| " | | 25M City of Nashville Tenn | 7 | | 625.00 | 3,422.13 | |

Forwarded Sheet 44

Petitioners' Exhibit 2.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Sept 1 | Balance Brought Forward | | | | 3,422.13 | 3,422.13 |
| 9037 I | Sep 1 | 27M City of Minneapolis Minn | 7 | | 540.00 | | |
| " | | 25M " " | 7 | | 500.00 | | |
| " | | 19M " " | 7 | | 380.00 | | |
| " | | 4M City of Los Angeles Calif | 7 | | 95.00 | | |
| " | | 2M " " | 7 | | 47.50 | | |
| " | | 40M City of Cleveland | 7 | | 900.00 | | |
| " | | 20M City of Baltimore | 7 | | 400.00 | 6,284.63 | 6,284.63 |
| 9037 I | Sep 1 | Divd 1500 Ligget & Myers Tob Co | 6 | | 1,500.00 | | |
| " | | Divd 1100 " " | 6 | | 1,100.00 | 8,884.63 | 8,884.63 |
| 9037 I | Sep 5 | Recd from Estate of Angler B Duke being 1/4 sh proceeds sale 2 tickets Natl Mens' Championship West Side Tennis Club | 12 | | 5.00 | | |
| " | | Recd from Estate of Angler B Duke being 1/2 sh of 6 mos int ending Aug 31 1931 on 110M N Y C 4 1/4 % bonds held by N Y State Tax Commission | 8 | | 584.37 | 9,474.00 | 9,474.00 |
| 9037 I | Sep 12 | Paid Coll Int Rev 3rd Quarterly Installment 1930 Fed Income Tax on Undistributed Income | 27 | 4,535.19 | | 4,938.81 | 4,938.81 |
| 9037 I | Sep 15 | 87 Stand Oil Co of Ind | 6 | | 21.75 | 4,960.56 | 4,960.56 |
| 9037 I | Sep 16 | Charges coll \$400 coupons City of Balt | 23 | .40 | | | |
| " | | Charges coll \$800 State of Maine | 23 | .33 | | 4,959.83 | 4,959.83 |
| 9037 I | Sep 30 | 31 shs Guaranty Tr Co | 6 | | 155.00 | 5,114.83 | 5,114.83 |
| 9037 I | Sep 30 | 14M British Amer Tob Co | 6 | | 2,362.50 | 7,477.43 | 7,477.43 |
| 9037 I | Oct 1 | 5M State of Oregon | 7 | | 112.50 | | |
| | | 3M State of " " | 7 | | 67.50 | | |
| | | 4M " " | 7 | | 90.00 | | |
| | | 2M Hud & Man R R Co | 1 | | 50.00 | | |
| | | 15M County of Erie N Y | 8 | | 318.75 | | |
| | | 6M County of Erie N Y | 8 | | 127.50 | | |
| | | 10M " " | 8 | | 403.75 | | |
| | | 25M City of Yonkers N Y | 8 | | 562.50 | | |
| | | 1M City of Summit N J | 7 | | 20.00 | | |
| | | 1M " " | 7 | | 20.00 | | |
| | | 2M " " | 7 | | 40.00 | | |
| | | 2M " " | 7 | | 40.00 | | |
| | | 8M " " | 7 | | 160.00 | | |
| | | 2M " " | 7 | | 40.00 | | |
| | | 10M City of Buffalo N Y | 8 | | 212.50 | | |
| | | 6M City of Balt Md | 7 | | 120.00 | 9,862.43 | 9,862.43 |
| 9037 I | Oct 1 | 1629 & 3/5 shrs U S Tob Co | 6 | | 1,791.90 | 11,654.33 | 11,654.33 |
| 9037 I | Oct 1 | 3300 shrs Tex Corp | 6 | | 1,650.00 | | |
| | | 11658 & 62/100 shrs Duke Pr Co | 6 | | 14,572.50 | 27,876.83 | |

Forwarded to Sheet 45

Petitioners' Exhibit 2.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|-----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Oct 1 | Brought Forward | | | | 27,876.83 | 27,876.83 |
| 9037 I | Oct 1 | 594 shrs Lehigh Valley Coal Corp | 6 | | 445.50 | 28,322.33 | 28,322.33 |
| 9037 I | Oct 1 | 125 shrs Durham & So Ry Co | 6 | | 312.50 | 28,634.83 | 28,634.83 |
| 9037 I | Oct 1 | 603 shrs Aluminum Co of Amer | 6 | | 904.50 | 29,539.33 | 29,539.33 |
| 9037 I | Oct 2 | 1258 shrs Durham Holding Corp | 6 | | 1,258.00 | 30,797.33 | 30,797.33 |
| 9037 I | Oct 2 | 997 shrs Cannon Mills Co | 6 | | 398.80 | 31,196.13 | 31,196.13 |
| 9037 I | Oct 13 | 125 shs Piedmont & No Ry Co | 6 | | 156.25 | 31,352.38 | 31,352.38 |
| 9037 I | Oct 15 | 10M City of Newark N J | 7 | | 225.00 | | |
| | | 12M City of N Y | 8 | | 255.00 | 31,832.38 | 31,832.38 |
| 9037 I | Oct 22 | Charges incurred in coll of \$502.50 cpns of the City of Youkers N Y | 22 | .22 | | 31,832.16 | 31,832.16 |
| 9037 I | Oct 23 | Charges incurred in coll of \$850 cpns of the County of Erie | 22 | .24 | | 31,831.92 | 31,831.92 |
| 9037 I | Oct 31 | Paid Cordella Biddle Robertson gen gdn Anthony Newton Duke | 27 | 2,500.00 | | 29,331.92 | 29,331.92 |
| 9037 I | Oct 31 | 12M County of Georgetown S C | 7 | | 300.00 | 29,691.92 | 29,691.92 |
| 9037 I | Nov 2 | 14M City of Hartford Conn | 7 | | 297.50 | | |
| | | 30M City of Hartford Conn | 7 | | 637.50 | | |
| | | 5M City of " | 7 | | 106.25 | | |
| | | 10M City of Jersey City N J | 7 | | 225.00 | | |
| | | 25M City of Norfolk Va | 7 | | 625.00 | | |
| | | 6M Fed Farm Loan Fed Land Bank of Houston | 9 | | 135.00 | 31,718.17 | 31,718.17 |
| 9037 I | Nov 2 | 6M Fed Farm Loan Fed Land Bank of New Orleans | 9 | | 135.00 | | |
| | | 8M Mayor & Council of Wilmington Del | 7 | | 180.00 | | |
| | | 4M Mayor & Council of Wilmington Del | 7 | | 90.00 | | |
| | | 3M Town of Kearney County of Hudson N J | 7 | | 67.50 | | |
| | | 1M Town of Kearney County of Hudson N J | 7 | | 22.50 | | |
| | | 8M Town of Kearney County of Hudson N J | 7 | | 180.00 | | |
| | | 12M Washington Md | 7 | | 270.00 | 32,663.17 | 32,663.17 |
| 9037 I | Nov 2 | 1875 shrs Amer Machine & Fdry Co | 6 | | 656.25 | 33,319.42 | 33,319.42 |
| 9037 I | Nov 11 | Recd from Estate of Angler B Duke refund of int assessed by & paid to Coll Int Rev on Deficiency Estate Tax 1928 | | | | | |
| | | Acad int on same | | | | | |
| | | | | | | 73321.46 | |
| | | Less amt paid to Carlin & Rover for collecting same | | | | 14664.29 | |
| | | | | | | 58657.17 | |
| | | 1/4th thereof due income of this trust | | | | 14664.29 | |
| 9037 I | Nov 13 | Bt 34M Cit of Newark N J 4s due 6/1/38 | 12 | | 14,664.29 | 47,983.71 | 47,983.71 |
| | | 4 1/4 basis less 1/4 net & int | | 32,569.21 | | | |
| | | Acad int from June 1/31 to Nov 13/31 | | 612.00 | | 14,802.50 | |

Petitioners' Exhibit 2.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|----------|----------|-----------|------------------|
| | 1931 | | | | | | |
| | Nov 13 | Brought Forward | | | | 14,802.50 | 14,802.50 |
| 9037 I | Nov 14 | 728 shs Erwin Cotton Mills Co | 6 | | 1,002.00 | 15,804.50 | 15,804.50 |
| 9037 I | Nov 16 | 10M City of Detroit Mich | 7 | | 212.50 | | |
| | | 10M City of Newark N J | 7 | | 212.50 | | |
| | | 10M " | 7 | | 212.50 | | |
| | | 10M " | 7 | | 212.50 | | |
| | | 18M " | 7 | | 382.50 | | |
| | | 10M Hudson County N J | 7 | | 225.00 | | |
| | | 7M " | 7 | | 157.50 | 17,509.50 | 17,509.50 |
| 9037 I | Nov 17 | Charges incurred in coll of \$1041.25 cpm of the City of Hartford Conn | 23 | .24 | | 17,509.26 | 17,509.26 |
| 9037 I | Nov 28 | Charges incurred in the collection of \$1020 coupons of the City of Newark | 23 | .24 | | 17,509.02 | 17,509.02 |
| 9037 I | Dec 1 | 16M Westchester County N Y | 8 | | 320.00 | | |
| | | 13M West County N Y | 8 | | 260.00 | | |
| | | 6M Miami Conservancy Dist | 7 | | 165.00 | | |
| | | 3M County of Westchester N Y | 8 | | 67.50 | | |
| | | 20M " | 8 | | 400.00 | | |
| | | 7M " | 8 | | 157.50 | | |
| | | 12M County of Mecklenburg N C | 7 | | 285.00 | | |
| | | 50M City of New York | 8 | | 1,062.50 | | |
| | | 6M City of Newark N J | 7 | | 120.00 | | |
| | | 15M City of Detroit | 7 | | 318.75 | 20,665.27 | 20,665.27 |
| 9037 I | Dec 1 | 34M City of Newark N J | 7 | | 680.00 | | |
| | | 1500 shs Liggett & Myers Tobacco Co | 6 | | 1,500.00 | 22,845.27 | 22,845.27 |
| 9037 I | Dec 1 | 1100 shs Liggett & Myers Tob Co | 6 | | 1,100.00 | 23,945.27 | 23,945.27 |
| 9037 I | Dec 2 | 9M City of Cleveland Ohio | 7 | | 202.50 | | |
| | | 10M City of " | 7 | | 225.00 | 24,372.77 | 24,372.77 |
| 9037 I | Dec 9 | Charges incurred in coll of \$680 cpns of City of Newark | 23 | .22 | | | |
| | | Charges incurred in coll of \$580 cpns of County of Westchester | 24 | .22 | | 24,372.33 | 24,372.33 |
| 9037 I | Dec 12 | Paid Coll of Int Rev Final Installment 1030 Fed Income Tax on Undistributed Income | | 4,535.19 | | 19,837.14 | 19,837.14 |
| 9037 I | Dec 15 | 8M County of Fairfax Va | 7 | | 200.00 | | |
| | | 2M City of Newark N J | 7 | | 42.50 | | |
| | | 9M City of " | 7 | | 191.25 | | |
| | | 14M City of Newark N J | 7 | | 297.50 | | |
| | | 40M City of Detroit Mich | 7 | | 850.00 | | |
| | | 20M " | 7 | | 450.00 | | |
| | | 25M City of Detroit Mich | 7 | | 531.25 | 22,399.64 | 22,399.64 |
| 9037 I | Dec 15 | 87 shrs Std Oil Co of Indiana | 6 | | 21.75 | 22,421.39 | 22,421.39 |
| 9037 I | Dec 16 | Dividend on 1750 shs Tobacco Sec Trust Co Ltd deferred reg shs | 3 | | 117.25 | | |
| | | Dividend on 1750 shs Tobacco Sec Trust Co | 3 | | 560.00 | 23,008.64 | |

Balance Forwarded to Page 47

Petitioners' Exhibit 2.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|-------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Dec 16 | Balance Brought Forward | | | | 23,008.64 | 23,008.64 |
| 37 I | Dec 18 | Int to 11/22/31 on bal | 2 | | 286.23 | 23,384.87 | 23,384.87 |
| 37 I | Dec 26 | Div 728 shs Erwin Cotton Mills Co | 6 | | 1,092.00 | 24,476.87 | 24,476.87 |
| 37 I | Dec 29 | Charges incurred in the coll of \$531.25 coupons of the City of Newark | 23 | 22 | | 24,476.65 | 24,476.65 |
| 37 I | Dec 31 | Div 31 shs Guaranty Trust Co Capt | 6 | | 155.00 | 24,631.65 | 24,631.65 |
| | 1932 | | | | | | |
| 37 I | Jan 2 | Int \$12000 Washington Md Suburban Dist Sanitary | 7 | | 270.00 | | |
| | | Int \$50000 State of West Va | 7 | | 1,000.00 | | |
| | | Int \$16000 State of West Va | 7 | | 340.00 | | |
| | | Int \$9000 " | 7 | | 191.25 | | |
| | | Int \$50000 State of Tenn | 7 | | 1,327.50 | | |
| | | Int \$6000 State of No Carolina Institutional Bldg | 7 | | 135.00 | | |
| | | Int \$25000 State of No Carolina | 7 | | 562.50 | | |
| | | Int \$165000 State of N J | 7 | | 3,506.25 | | |
| | | Int \$10000 " | 7 | | 212.50 | | |
| | | Int \$12000 Spokane County State of Wash | 7 | | 285.00 | | |
| | | Int \$2000 Middlesex County N J | 7 | | 42.50 | | |
| | | Int \$1000 Hudson County N J | 7 | | 22.50 | | |
| | | Int \$2000 " | 7 | | 45.00 | | |
| | | Int \$14000 " | 7 | | 315.00 | | |
| | | Int \$2000 " | 7 | | 45.00 | | |
| | | Int \$4000 " | 7 | | 90.00 | | |
| | | Int \$12000 East Bay Municipal Utility Dist of Calif | 7 | | 300.00 | | |
| | | Int \$10000 County of Sumter S C | 7 | | 250.00 | | |
| | | Int \$15000 City of Trenton N J | 7 | | 337.50 | | |
| | | Int \$10000 " | 7 | | 225.00 | | |
| | | Int \$20000 City of Richmond Va | 7 | | 450.00 | | |
| | | Int \$1000 " | 7 | | 22.50 | | |
| | | Int \$11000 " | 7 | | 247.50 | | |
| | | Int \$38000 City of Phila Pa | 7 | | 807.50 | | |
| | | Int \$20000 " | 7 | | 425.00 | | |
| | | Int \$18000 " | 7 | | 360.00 | | |
| | | Int \$74000 " | 7 | | 1,572.50 | | |
| | | Int \$8000 " | 7 | | 100.00 | | |
| | | Int \$2000 City of Milw Wise | 7 | | 45.00 | | |
| | | Int \$57000 " | 7 | | 1,282.50 | | |
| | | Int \$23000 City of Memphis Tenn | 7 | | 575.00 | | |
| | | Int \$1000 " | 7 | | 23.75 | | |
| | | Int \$1000 " | 7 | | 25.00 | | |
| | | Int \$20000 City of Kansas City Mo | 7 | | 450.00 | | |
| | | Int \$10000 " | 7 | | 225.00 | | |
| | | Int \$12000 City of Greenville S C | 7 | | 270.00 | | |
| | | Int \$12000 City of Dubuque Iowa | 7 | | 270.00 | | |
| | | Int \$12000 City of Detroit Mich | 7 | | 270.00 | 41,615.40 | 41,615.40 |
| 37 I | Jan 2 | 1629 & 3/5 shs U S Tobacco Com Com | 6 | | 1,791.90 | | |
| | | 11658 & 62/100 shs Duke Power Co | 6 | | 14,572.50 | 57,979.80 | |

Petitioners' Exhibit 2.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|-------------|---|----------------|-----------|----------|-----------|------------------|
| | 1932 | | | | | | |
| | Jan 2 | Brought Forward | | | | 57,979.80 | 57,979.80 |
| 9037 I | Jan 2 | Div 3300 shs Texas Corp | 6 | | 1,670.00 | 59,629.80 | 59,629.80 |
| 9037 I | Jan 2 | Div 125 shs Durham & Southern Ry Co | 6 | | 312.50 | 59,942.30 | 59,942.30 |
| 9037 I | Jan 2 | Div 603 shs Aluminum Co of Amer | 6 | | 904.50 | | |
| | | Div 997 shs Cannon Mills Co Com | 6 | | 398.80 | 61,245.00 | 61,245.00 |
| 9037 I | Jan 4 | Div 25 shs Erwin Cotton Mills Co | 6 | | 75.00 | 61,320.00 | 61,320.00 |
| 9037 I | Jan 4 | Div 1258 shs Durham Holding Corp Com | 6 | | 1,258.00 | 62,578.00 | 62,578.00 |
| 9037 I | Jan 4 | Int \$12000 State of Calif | 7 | | 240.00 | 62,818.00 | 62,818.00 |
| 9037 I | Jan 4 | Accd int fr 1/1/32 to 1/4/32 \$5000 State of New Jersey | 23 | 1.77 | | 62,816.83 | 62,816.83 |
| 9037 I | Jan 8 | Accd int fr 11/1/32 to 1/7/32 on \$3000 City of St Paul Minn | 23 | 24.75 | | 62,792.08 | 62,792.08 |
| 9037 I | Jan 11 | Div 125 shs Piedmont & Northern Ry Co | 6 | | 156.25 | 62,948.33 | 62,948.33 |
| 9037 I | Jan 11 | Accd int fr 1/1/32 to 1/11/32 on \$8000 State of New Jersey | 23 | 8.80 | | | |
| | | Bought \$8000 State of New Jersey 4% due 7/1/50 91 net & int | 27 | 7,280.00 | | 55,659.44 | 55,659.44 |
| 9037 I | Jan 13 | Accd int fr 12/15/31 to 1/12/32 on \$10000 City of Buffalo | 24 | 54.00 | | | |
| | | Bt \$10000 City of Buffalo Regd 4 1/2% due 6/15/64 4.70 basis net & int | 27 | 15,469.58 | | 40,135.86 | 40,135.86 |
| 9037 I | Jan 15 | Int \$2000 City of Troy N Y | 8 | | 40.00 | | |
| | | Int \$3000 " | 8 | | 60.00 | | |
| | | Int \$3000 " | 8 | | 60.00 | | |
| | | Int \$2000 " | 8 | | 40.00 | | |
| | | Int \$2000 " | 8 | | 40.00 | 40,375.86 | 40,375.86 |
| 9037 I | Jan 23 | Charges incurred in the coll of \$562.50 cpns of the City of Trenton N J | 22 | .22 | | | |
| | | Charges incurred in the coll of \$2380 cpns of the City of Phila | 22 | .50 | | 40,375.14 | 40,375.14 |
| 9037 I | Jan 28 | Div 14000 shs British Amer Tobacco Co Ltd final at 8d Interim at 10d | 3 | | 3,617.25 | 43,992.39 | 43,992.39 |
| 9037 I | Jan 30 | Charges incurred in the coll of \$270 cpns of the City of Dubuque Ia | 22 | .25 | | 43,992.14 | 43,992.14 |
| 9037 I | Feb 1 | Int \$25000 City of Detroit Mich | 7 | | 562.50 | | |
| | | Int \$30000 City of Trenton N J | 7 | | 637.50 | 45,192.14 | 45,192.14 |
| 9037 I | Feb 1 | Div 1875 shs American Machine & Filry Co Comm | 6 | | 656.25 | 45,848.39 | 45,848.39 |
| 9037 I | Feb 1 | Paid Cordella Biddle Robertson gen gdn Anthony Newton Duke For support maintenance & education of Anthony Newton Duke | 27 | 2,500.00 | | | |
| | | Charges incurred in the coll of \$3566.25 cpns of the State of N J | 22 | .31 | | 43,348.08 | 43,348.08 |
| 9037 I | Feb 8 | Charges incurred in the coll of \$637.50 cpns of the City of Trenton | 22 | .22 | | 43,347.86 | 43,347.86 |

Balance Forwarded to Page 49

Petitioners' Exhibit 3.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|---|----------------|------------|------------|-----------|------------------|
| | 1930 | | | | | | |
| | Dec 31 | Balance Forwarded | | 613,261.07 | 599,986.27 | 13,274.80 | |
| | 1931 | | | | | | |
| 038 P. | Jan 16 | Sold 6M Bd of Education of City School Dist of City of Cleve Ohio Bldg 6s due 6/1/38 dated 6/1/20 4.10 basis less $\frac{3}{4}$ net & int | | | 6,673.91 | | |
| " | | Sold 10M Hud Co N J Newark Turnpike Imp $4\frac{1}{2}$ s due 7/1/32 $3\frac{3}{4}$ basis less $\frac{3}{4}$ net & int | | | 10,139.01 | | |
| " | | Sold 17M Hud Co N J Hospital for Insane $4\frac{1}{2}$ s due 7/1/32 $3\frac{3}{4}$ basis less $\frac{3}{4}$ net & int | | | 17,236.32 | | |
| " | | Sold 1M Hud Co N J Rd Bonds $4\frac{1}{2}$ s due 7/1/32 $3\frac{3}{4}$ basis less $\frac{3}{4}$ net & int | | | 1,013.90 | | |
| " | | Sold 25M Hud Co N J Jail Bonds $4\frac{1}{2}$ s due 7/1/32 $3\frac{3}{4}$ basis less $\frac{3}{4}$ net & int | | | 25,347.53 | 47,135.87 | |
| 038 P | 20 | Trsf'd fr inc as above per proof of cash | | | | | |
| | | As of 11/15/26 cost of 100M State of N J | | | 101,596.44 | | |
| | | As of 11/17/26 cost of 20M City of Det | | | 20,500.62 | | |
| | | As of 11/23/26 cost of 50M State of N J | | | 50,750.00 | | |
| | | As of 7/26/29 cost of 8M State of Tenn | | | 7,959.82 | | |
| | | As of 11/29/26 cost of 76M Hud Co N J | | | 76,782.02 | | |
| | | As of 8/27/29 11M City of Cleve | | | 11,000.00 | | |
| | | As of 7/29/29 50M Hud Co N J | | | 50,187.50 | | |
| | | 11/30/26 cost of Fed Stamps | | | 1.00 | | |
| | | As of 10/1/29 cost of 540 shrs Duke Pr Co | | | 54,000.00 | | |
| | | Trsf'd to inc a/c as above per proof of cash | | | | | |
| | | As of 2/27/26 recd fr Est A B Duke | | 250,000.00 | | | |
| | | As of 4/21/26 cost of Fed Stamps | | .84 | | | |
| | | As of 4/27/26 sale 250 Amer Mach & Fdy Rts | | 112.50 | | | |
| | | As of 5/15/26 cost of Stamps | | 2.84 | | | |
| | | As of 1/5/29 sale 1000 Texas Corp Rts | | 4,131.00 | | | |
| | | 1800 " | | 6,956.70 | | | |
| | | 200 " | | 838.80 | | | |
| | | 300 " | | 1,220.70 | | | |
| | | 9/5/29 sale 100 Duke Pr Co | | 2,049.80 | | | |
| | | 81 " | | 1,888.05 | | | |
| | | 900 Duke Pr Co | | 19,698.90 | | | |
| | | 1800 " | | 39,833.90 | | | |
| | | 200 " | | 4,187.10 | | | |
| | | 300 " | | 5,861.90 | | | |
| | | 9/6/29 sale 600 " | | 10,948.80 | | | |
| | | 9/11/29 sale 1200 " | | 21,447.60 | | | |
| | | 9/16/29 sale 300 " | | 6,599.40 | | | |
| | | 6/12/28 sale 31 Gty Tr Co Rts | | 4,339.79 | | 39,795.35 | |
| 38 | | Pd City Bk Farmers Tr Co being comm for receiving 13,844,608.23 & paying out \$12,798.62 of princ per Dec Ord of Ct 1/2/31 | | 38,041.06 | | | |
| | | Pd T B C & M being prop shr of costs & disb as taxed per Dec dated 1/2/31 | | 30.52 | | 1,123.77 | |
| 38 P | May 26 | Warrant for 2/8 sh Aluminum Ltd cash transaction only 29 net | | | 7.25 | 1,131.02 | |
| 38 P | May 28 | Cost of ins \$7.50 and postage 17¢ 75M City of Phil $4\frac{1}{2}$ s | | 7.67 | | 1,123.35 | |

Petitioners' Exhibit 3.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|---------|--|----------------|-----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | May 28 | Balance Brought Forward | | | | 1,123.35 | 1,123.35 |
| 9038 P | June 1 | To cover registered mail on 75M City of Phil sent out permanent bonds | | 1.76 | | 1,121.59 | 1,121.59 |
| 9038 P | June 10 | Cost of fed stamps for tfr of 64 rts Aluminum Ltd A | | .16 | | 1,121.43 | 1,121.43 |
| 9038 P | June 12 | Sold a warrant for 8 2/8 shares Aluminum Ltd at 17 less bkg & tax 2 rts at 2 net less tax | | | 138.91 | 1,260.34 | 1,260.34 |
| 9038 P | Jul 1 | Red 6M State of Montana | | | 6,000.00 | 7,260.34 | 7,260.34 |
| 9038 P | Jul 3 | Red 1M County of Hudson N J 4 1/2s | | | 1,000.00 | | |
| " | | Red 3M County of Hudson N J 4 1/2s | | | 3,000.00 | | |
| " | | Sold 12M County of Duval of Florida Spl 5s due 4/1/50 98 1/4 net and int | | | 11,790.00 | 23,050.34 | 23,050.34 |
| 9038 P | Jul 6 | Bt 7M City of Phil 4s due 2/1/53 3.85 basis less 1/2 net & int | | 7,144.01 | | | |
| " | | Bt 2M City of Phil 4s due 7/1/80/50 3.85 basis less 1/2 net and int | | 2,037.64 | | 13,868.69 | 13,868.69 |
| 9038 P | Jul 21 | Bt 13M Erie County N Y 3 3/4s due 7/1/52 101 net and inte | | 13,130.00 | | 738.69 | 738.69 |
| 9038 P | Sep 14 | Warrant 8 shares Aluminum Ltd 12 less bkge and tax per warrant | | | 94.84 | 833.53 | 833.53 |
| 9038 P | Dec 17 | Sold 100 sbs American Cigar Co Com | | | 7,996.00 | 8,829.53 | 8,829.53 |
| | 1932 | | | | | | |
| 9038 P | Jan 4 | Bt \$5000 Westchester Co N Y 4 1/4s due 6/1/64 4.50% basis net & int | | 4,787.71 | | 4,041.82 | 4,041.82 |
| 9038 P | Jan 5 | Bt \$3000 Westchester Co of N Y 4 1/4s due 6/1/60 4.50 basis net & int | | 2,880.31 | | 1,161.51 | 1,161.51 |
| 9038 P | Jul 7 | Redemp of 13000.00 Hudson Co N J Road Bonds 4 1/2s due 7/1/32 13000.00 Less coll chge & fed tax 6.52 | | | 12,993.48 | 14,154.99 | 14,154.99 |
| 9038 P | Jul 14 | Bt \$7000 State of N J 4 1/2s due 7/1/67 4.35 basis less 1/2 net & int | | 7,152.67 | | 7,002.32 | 7,002.32 |
| 9038 P | Aug 1 | Bt 6M City of St Paul Minn 4 1/2s due 7/1/46 W I 4.35 basis less 1/4 net & int | | 6,078.02 | | 924.30 | 924.30 |

Fwd to Sheet 9

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|------------|------------|-----------|------------------|
| | 1930 | | | | | | |
| | Dec 23 | Balance Forwarded | | 818,223.89 | 826,681.48 | 8,457.59 | 8,457.59 |
| 0038 I | Dec 24 | Int to 11/26/30 Inc | | | 208.80 | 8,666.39 | 8,666.39 |
| 0038 I | 30 | Coll charges ded on cpns aggregating \$1100 of Co of Westchester | | .46 | | 8,665.93 | 8,665.93 |
| 0038 I | 31 | Divd 31 Gty Tr Co N Y | 6 | | 155.00 | 8,820.93 | 8,820.93 |
| 0038 I | | Divd 125 Durham & So Ry | 6 | | 312.50 | 9,133.43 | 9,133.43 |
| 0038 I | Jan 2 | 12M Wash Md | 7 | | 270.00 | | |
| " | | 50M State of W Va | 7 | | 1,000.00 | | |
| " | | 59M State of Tenn | 7 | | 1,327.50 | | |
| " | | 6M State of No Car | 7 | | 135.00 | | |
| " | | 25M State of No Car | 7 | | 562.50 | | |
| " | | 21M State of N J | 7 | | 446.25 | | |
| " | | 150M State of N J | 7 | | 3,187.50 | | |
| " | | 6M State of Montana | 7 | | 165.00 | | |
| " | | 14M Hud Co N J | 7 | | 315.00 | | |
| " | | 1M Hud Co N J | 7 | | 222.50 | | |
| " | | 1M " | 7 | | 222.50 | | |
| " | | 10M Hud Co N J | 7 | | 225.00 | | |
| " | | 25M Hud Co N J | 7 | | 562.50 | | |
| " | | 3M " | 7 | | 67.50 | | |
| " | | 4M " | 7 | | 90.00 | | |
| " | | 17M " | 7 | | 382.50 | | |
| " | | 1M " | 7 | | 222.50 | | |
| " | | 12M Ea Bay Municipal Utility Dist of Cal | 7 | | 300.00 | | |
| " | | 10M Co of Sumter S C | 7 | | 250.00 | | |
| " | | 12M Co of Spokane | 7 | | 285.00 | | |
| " | | 10M City of Trenton | 7 | | 225.00 | | |
| " | | 9M City of Richmond Va | 7 | | 202.50 | | |
| " | | 3M City of Richmond Va | 7 | | 67.50 | | |
| " | | 38M City of Phila | 7 | | 807.50 | | |
| " | | 19M City of Phila | 7 | | 403.75 | | |
| " | | 25M City of Milw | 7 | | 562.50 | | |
| " | | 33M City of Milw | 7 | | 742.50 | | |
| " | | 23M City of Memphis | 7 | | 575.00 | | |
| " | | 1M City of Memphis | 7 | | 23.75 | | |
| " | | 1M City of Memphis | 7 | | 25.00 | | |
| " | | 20M City of Kansas City | 7 | | 450.00 | | |
| " | | 10M City of Kansas City | 7 | | 225.00 | | |
| " | | 12M City of Greenville S C | 7 | | 270.00 | | |
| " | | 12M City of Dubuque Iowa | 7 | | 270.00 | | |
| " | | 11M City of Det Mich | 7 | | 247.50 | | |
| " | | 25M City of Detroit Mich | 7 | | 531.25 | | |
| " | | 1M City of Det Mich | 7 | | 22.50 | | |
| " | | 2M City of Chic Ill | 7 | | 40.00 | 24,463.43 | 24,463.43 |
| 0038 I | | 11657 62/100 shrs Duke Pr Co | 6 | | 14,571.25 | 39,034.68 | 39,034.68 |
| 0038 I | | 1620 3/5 shrs U S Tobacco Co Com | 6 | | 1,629.00 | 40,663.68 | 40,663.68 |
| 0038 I | | Divd 997 Cannon Mills Co Com | 6 | | 398.80 | 41,062.48 | 41,062.48 |
| 0038 I | | Divd 3300 Texas Corp | 6 | | 2,475.00 | 43,537.48 | |

Forwarded

Petitioners' Exhibit 4.

1

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|-------|--|----------------|------------|------------|------------|------------------|
| | 1931 | Balance Forwarded | | 818,224.35 | 861,761.83 | 43,537.48 | 43,537.48 |
| 9038 I | Jan 2 | Divd 603 Aluminum Co of Amer Pfd | 6 | | 904.50 | | |
| " | | Divd 25 Erwin Cotton Mills | 6 | | 75.00 | 44,516.98 | 44,516.98 |
| 9038 I | | Divd 594 Lehigh Valley Coal Corp Pfd | 6 | | 445.50 | | |
| " | | 1258 shrs Durham Hold Corp Com | 6 | | 1,258.00 | | |
| | | Divd for Oct | 6 | | 1,258.00 | 47,478.48 | 47,478.48 |
| 9038 I | 12 | 125 shrs Piedmont & No Ry Co | 6 | | 156.25 | 47,634.73 | 47,634.73 |
| 9038 I | 15 | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M " " | 8 | | 20.00 | | |
| " | | 1M " " | 8 | | 20.00 | | |
| " | | 1M " " | 8 | | 20.00 | | |
| " | | 1M " " | 8 | | 20.00 | 47,874.73 | 47,874.73 |
| 9038 I | 16 | Accd int 12/1 to 1/16 on 6M Bd of Edu | | | | | |
| " | | City of Cleveland Ohio | 7 | | 45.00 | | |
| " | | Accd int 1/1 to 1/16 on 10M Hud Co N J | 7 | | 18.75 | | |
| " | | Accd int 1/1 to 1/16 on 17M Hud Co N J | 7 | | 31.88 | | |
| " | | Accd int 1/1 to 1/16 on 1M Hud Co N J | 7 | | 1.88 | | |
| " | | Accd int 1/1 to 1/16 on 25M Hud Co N J | 7 | | 46.88 | 48,019.12 | 48,019.12 |
| 9038 I | 20 | Trsf'd fr princ a/c as above per proof of cash | | | | | |
| | | As of 2/8/26 recd fr Est of A B Duke | 12 | | 250,000.00 | | |
| | | As of 4/21/26 cost of Fed Stamps | | | .84 | | |
| | | 4/27/26 sale 250 Amer Mach & Fdy Rts | | | 112.50 | | |
| | | 5/15/26 cost of Stamps | | | 2.84 | | |
| | | 1/5/29 sale 1000 Texas Corp Rts | | | 4,131.00 | | |
| | | 1800 Texas Corp | | | 6,956.70 | | |
| | | 200 " | | | 838.80 | | |
| | | 300 " | | | 1,220.70 | | |
| | | 9/5/29 sale 100 Duke Pr Rts | 12 | | 2,049.80 | | |
| | | 81 Duke Pr Rts | | | 1,888.05 | | |
| | | 900 Duke Pr Rts | | | 19,608.20 | | |
| | | 1800 " | | | 39,833.90 | | |
| | | 200 " | | | 4,187.10 | | |
| | | 300 " | | | 5,861.90 | | |
| | | 9/6/29 sale 600 " | | | 10,948.80 | | |
| | | 9/11/29 sale 1200 " | | | 21,447.00 | | |
| | | 9/16/29 sale 300 " | | | 6,599.40 | | |
| | | 6/12/28 sale 31 Gty Tr Co Rts | | | 4,339.70 | | |
| " | | Trsf'd fr princ a/c as above per proof of cash | | | | | |
| | | As of 11/15/26 cost of 100M State of N J | | 101,593.44 | | | |
| | | 11/17/26 cost of 20M City of Det | 27 | 20,500.62 | | | |
| | | 11/23/26 cost of \$50M State of N J | | 50,750.00 | | | |
| | | 11/29/26 cost of 76M Hud Co | | 76,782.02 | | 178,507.06 | |

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|-----------|----------|------------|------------------|
| | 1931 | | | | | | |
| | Jan 20 | Balance Brought Forward | | | | 178,507.96 | 178,507.96 |
| 038 I | Jan 20 | Continued | | | | | |
| | | As of 7/26/29 cost of 8M State of Tenn | | 7,959.82 | | | |
| | | As of 7/29/29 cost of 50M Hud Co | | 50,187.50 | | | |
| | | As of 8/27/29 cost of 11M City of Cleve | 27 | 11,000.00 | | | |
| | | As of 11/30/26 cost of Fed Stamps | | 1.00 | | | |
| | | As of 10/1/29 cost of 540 shrs Duke Pr Co | | 54,000.00 | | 55,359.64 | 55,359.64 |
| 038 I | 26 | Coll chg ded on \$807.50 City of Phila cpns | 23 | .25 | | 55,359.39 | 55,359.39 |
| 038 I | 27 | Coll chg ded on \$3187.50 State of N J | 23 | .40 | | 55,358.99 | 55,358.99 |
| 038 I | 28 | Coll chg ded on \$1710 Co of Hudson N J | 23 | .28 | | 55,358.71 | 55,358.71 |
| 038 I | | Coll chg ded on \$270 City of Dubuque | 23 | .70 | | 55,358.01 | 55,358.01 |
| 038 I | 28 | Divd 14000 British Amer Tob Co Ltd | | | | | |
| | | Final £1106 13 4 | | | | | |
| | | Interim 583 6 8 at 4 854073 | 3 | | 8,494.62 | 63,852.63 | 63,852.63 |
| 038 I | 31 | Pd Cordelia Biddle Robertson gen gdn Angier | | | | | |
| | | B Duke amt due support maintenance & education Angier B Duke | 27 | 2,500.00 | | 61,352.63 | 61,352.63 |
| 038 I | | Divd 135 Durham & So Ry Co | 6 | | 1,250.00 | 62,602.63 | 62,602.63 |
| 038 I | Feb 2 | 30M City of Trenton N J | 7 | | 637.50 | | |
| " | | 65M City of Detroit | 7 | | 1,462.50 | | |
| " | | 25M City of Detroit Mich | 7 | | 531.25 | | |
| " | | 1M City of Detroit | 7 | | 21.25 | | |
| " | | 14M City of Detroit | 7 | | 297.50 | | |
| | | | | | | 65,552.63 | 65,552.63 |
| 038 I | | 1875 shrs Amer Machine & Fdry Com | 6 | | 656.25 | 66,208.88 | 66,208.88 |
| 038 I | 6 | Divd 728 Erwin Cotton Mills Co Com | 6 | | 1,092.00 | 67,300.88 | 67,300.88 |
| 038 I | 16 | 8M State of Tenn | 7 | | 180.00 | 67,480.88 | 67,480.88 |
| 038 I | 27 | Coll chg ded on \$637.50 City of Trenton cpns | 23 | .22 | | 67,480.66 | 67,480.66 |
| 038 I | Mar 2 | 5M State of Mo | 7 | | 106.25 | | |
| | | 12M State of Ill | 7 | | 480.00 | | |
| " | | 3M Co of Guilford N C | 7 | | 78.75 | | |
| " | | 3M " | 7 | | 78.75 | | |
| " | | 3M City of Toledo | 7 | | 60.00 | | |
| " | | 2M " | 7 | | 40.00 | | |
| " | | 1M " | 7 | | 22.50 | | |
| " | | 2M " | 7 | | 40.00 | | |
| " | | 3M " | 7 | | 60.00 | | |
| " | | 5M " | 7 | | 100.00 | | |
| " | | 5M City of Oklahoma City | 7 | | 125.00 | | |
| " | | 10M " | 7 | | 250.00 | | |
| " | | 25M City of Nashville Tenn | 7 | | 625.00 | | |
| " | | 3M City of Minn | 7 | | 60.00 | | |
| " | | 19M City of Minn | 7 | | 380.00 | | |
| " | | 2M City of Minn | 7 | | 40.00 | | |
| " | | 37M City of Minn | 7 | | 940.00 | | |
| " | | 6M City of Los Angeles | 7 | | 142.50 | | |
| " | | 20M City of Balt Md | 7 | | 400.00 | 71,509.41 | |

Petitioners' Exhibit 4.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|---|----------------|-----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Mar 2 | Balance Brought Forward | | | | 71,509.41 | 71,509.41 |
| 9038 I | Mar 2 | Divd 1500 Liggett & Myers Tob Co Com | 6 | | 1,500.00 | | |
| " | " | Extra divd | 6 | | 1,500.00 | | |
| " | " | Divd 1100 Liggett & Myers Tob Co Com B | 6 | | 1,100.00 | | |
| " | " | Extra divd | 6 | | 1,100.00 | 76,709.41 | 76,709.41 |
| 9038 I | Mar 13 | Recd from Estate of Angler B Duke being 6 months int to Feb 28 1931 on 55M N Y City 4 1/4s held by N Y State Tax Comm | 8 | | 584.38 | 77,293.79 | 77,293.79 |
| 9038 I | Mar 16 | Divd 87 Stand Oil Co of Ind Cap | 6 | | 43.50 | 77,337.29 | 77,337.29 |
| 9038 I | Mar 17 | Paid Coll Int Rev 1930 Income Tax on Undistributed Income 1st Quarterly Installment | 27 | 3,385.92 | | 73,951.37 | 73,951.37 |
| 9038 I | Mar 17 | Accd int fr 2/27/31 to 3/17/31 75M City of Phil Pa 4 1/4s due 2/27/81/51 | 23 | 159.37 | | | |
| | | Bought 75M City of Phil Pa 4 1/4s due 2/27/81/51 103% net & int | 27 | 77,531.25 | | 3,739.25 | 3,739.25 |
| 9038 I | Mar 31 | Divd 31 Guaranty Tr Co of N Y | 6 | | 155.00 | 3,584.25 | 3,584.25 |
| 9038 I | Mar 31 | Divd 14000 British Amer Tobacco Co Ltd £ 583.68 at 4.85 1/2 | 3 | | 2,832.10 | 752.15 | 752.15 |
| 9038 I | Apr 1 | 4M State of Oregon | 7 | | 90.00 | | |
| " | " | 2M Hudson & Manhattan RR Co | 1 | | 50.00 | | |
| " | " | 5M State of Oregon | 7 | | 112.50 | | |
| " | " | 3M " | 7 | | 67.50 | | |
| " | " | 25M County of Erie N Y | 8 | | 531.25 | | |
| " | " | 12M County of Duval | 7 | | 300.00 | | |
| " | " | 25M City of Yonkers N Y | 8 | | 562.50 | | |
| " | " | 45M City of St Louis Mo | 7 | | 956.25 | 1,917.85 | 1,917.85 |
| 9038 I | Apr 1 | Divd 125 Durham & South Ry Co | 6 | | 312.50 | 2,230.35 | 2,230.35 |
| 9038 I | Apr 1 | 1M City of Asheville N C | 7 | | 23.75 | | |
| " | " | 5M City of Asheville N C | 7 | | 118.75 | | |
| " | " | 5M " | 7 | | 118.75 | 2,491.00 | 2,491.00 |
| 9038 I | Apr 1 | Divd 3300 Texas Corp | 6 | | 2,475.00 | | |
| " | " | 11657 62/100 Duke Power Co | 6 | | 14,571.25 | | |
| " | " | Divd 594 Lehigh Valley Coal Corp Pfd | 6 | | 445.50 | | |
| " | " | Divd 1258 Durham Holding Corp | 6 | | 1,258.00 | 21,241.35 | 21,241.35 |
| 9038 I | Apr 1 | Divd 997 Cannon Mills Co Common | 6 | | 398.80 | | |
| " | " | 1M City of Asheville N C | 7 | | 23.75 | | |
| " | " | 1629 3/5 United States Tobacco Co Com | 6 | | 1,791.90 | | |
| " | " | Divd 603 Aluminum Co of Amer | 6 | | 904.50 | 24,360.30 | 24,360.30 |
| 9038 I | Apr 3 | Cost of ins 5.25 and postage 60¢ on talons No. 2 detached fr 14M British Amer Tob Co Ltd | 22 | 5.85 | | 24,354.45 | |

Forwarded Sheet 41

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|----------|--------|-----------|------------------|
| | 1931 | | | | | | |
| | Apr 3 | Balance Brought Forward | | | | 24,354.45 | 24,354.45 |
| 0038 I | Apr 13 | Divd 125 Piedmont & Northern Rwy Co Cap | 6 | | 156.25 | 24,510.70 | 24,510.70 |
| 0038 I | Apr 13 | Paid Dept of Taxation & Finance 1930 New York State Income Tax on Undistributed Income | 27 | 5,211.88 | | 19,298.82 | 19,298.82 |
| 0038 I | Apr 15 | 12M City of N Y | 8 | | 255.00 | 19,553.82 | 19,553.82 |
| 0038 I | Apr 24 | Charges incurred in collection of \$531.25 coupons of Co of Erie | 23 | .23 | | 19,553.59 | 19,553.59 |
| 0038 I | Apr 24 | Charges incurred in collection of \$562.50 coupons of City of Yonkers | 24 | .23 | | 19,553.36 | 19,553.36 |
| 0038 I | Apr 30 | Paid Cordella Biddle Robertson gen gdn Angler B Duke | 7 | | 67.50 | | |
| | | | 27 | 2,500.00 | | 17,053.36 | 17,053.36 |
| 0038 I | Apr 30 | 12M County of Georgetown S C | 7 | | 390.00 | 17,413.36 | 17,413.36 |
| 0038 I | May 1 | 9M Town of Kearny N J | 7 | | 202.50 | | |
| " | | 12M Washington Md | 7 | | 270.00 | | |
| " | | 3M Town of Kearny N J | 7 | | 67.50 | | |
| " | | 10M City of Jersey City N J | 7 | | 225.00 | | |
| " | | 7M Mayor & Council of Wilmington Del | 7 | | 157.50 | | |
| " | | 5M " | 7 | | 112.50 | | |
| " | | 6M Fed Land Bk of Houston | 9 | | 135.00 | | |
| " | | 6M Fed Ld Bk of New Orleans | 9 | | 135.00 | | |
| " | | 25M City of Norfolk Va | 7 | | 625.00 | | |
| " | | 4M City of New Rochelle N Y | 8 | | 80.00 | 19,423.36 | 19,423.36 |
| 0038 I | May 1 | Divd 1875 Amer Machine & Foundry Co Com | 6 | | 656.25 | 20,079.61 | 20,079.61 |
| 0038 I | May 15 | 5M Hudson County N J | 7 | | 112.50 | | |
| " | | 5M " | 7 | | 112.50 | | |
| " | | 6M " | 7 | | 135.00 | | |
| " | | 4M " | 7 | | 90.00 | | |
| " | | 15M " | 7 | | 337.50 | | |
| " | | 8M " | 7 | | 180.00 | | |
| " | | 25M " | 7 | | 562.50 | | |
| " | | 10M City of Newark N J | 7 | | 212.50 | | |
| " | | 12M " | 7 | | 255.00 | | |
| " | | 18M " | 7 | | 382.50 | | |
| " | | 10M " | 7 | | 212.50 | | |
| " | | 47M City of Detroit Mich | 7 | | 940.00 | 23,612.11 | 23,612.11 |
| 0038 I | May 21 | Divd 1750 Tob Sec Tr Co | 3 | | 332.50 | 23,944.61 | |

Forwarded Sheet 42

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|---------|--|----------------|----------|----------|-----------|------------------|
| | 1931 | | | | | | |
| | May 27 | Balance Brought Forward | | | | 23,044.61 | 23,044.61 |
| 9038 I | June 1 | 1M County of Westchester N Y | 8 | | 22.50 | | |
| " | " | 3M " " | 8 | | 67.50 | | |
| " | " | 6M " " | 8 | | 135.00 | | |
| " | " | 12M County of Mecklenburg N C | 7 | | 285.00 | | |
| " | " | 34M City of N Y | 8 | | 722.50 | | |
| " | " | 16M City of N Y | 8 | | 340.00 | | |
| " | " | 15M City of Detroit | 7 | | 318.75 | | |
| " | " | 10M " " | 7 | | 212.50 | | |
| " | " | 12M City of Detroit Mich | 7 | | 255.00 | | |
| " | " | 27M Westchester County N Y | 8 | | 540.00 | | |
| " | " | 6M Miami Conservancy District | 7 | | 165.00 | | |
| " | " | 31M County of Westchester N Y | 8 | | 620.00 | 27,628.36 | 27,628.36 |
| 9038 I | June 1 | Divd 1500 Liggett & Myers Tobacco Co Com | 6 | | 1,500.00 | | |
| " | " | 1100 shs " " | 6 | | 1,100.00 | 30,228.36 | 30,228.36 |
| 9038 I | June 1 | Int regd 1M City of Cleve Ohio | 7 | | 22.50 | | |
| " | " | Int regd 10M " " | 7 | | 225.00 | 30,475.86 | 30,475.86 |
| 9038 I | June 6 | \$12,000 City of Balto Md | 7 | | 240.00 | 30,715.86 | 30,715.86 |
| 9038 I | June 12 | Paid Coll of Int Rev 2nd qtr install 1930 | | | | | |
| | | Fed Inc Tax | 27 | 3,385.91 | | 27,329.95 | 27,329.95 |
| 9038 I | June 15 | 8M County of Fairfax Va | 7 | | 200.00 | | |
| " | " | 4M City of Newark N J | 7 | | 85.00 | | |
| " | " | 10M City of Newark N J | 7 | | 403.75 | | |
| " | " | 20M City of Detroit Mich | 7 | | 450.00 | 28,468.70 | 28,468.70 |
| 9038 I | June 15 | 87 sh Std Oil Co of Indiana cap | 6 | | 43.50 | 28,512.20 | 28,512.20 |
| 9038 I | June 15 | \$8000 City of Detroit Mich | 7 | | 170.00 | | |
| " | " | \$17000 City of Detroit Mich | 7 | | 361.25 | 29,043.45 | 29,043.45 |
| 9038 I | June 19 | Int to 5/22/31 on bal | 2 | | 226.97 | 29,270.42 | 29,270.42 |
| 9038 I | June 25 | Charges incurred coll \$1062.50 Newark N J coupons | 23 | .25 | | | |
| " | " | Charges incurred coll \$562.50 County of Hudson coupons | 23 | .22 | | | |
| " | " | Charges incurred coll \$620 Westchester County N Y coupons | 24 | .23 | | 29,269.72 | 29,269.72 |
| 9038 I | June 25 | Charges incurred in coll \$540 Westchester Co N Y coupons | 24 | .23 | | 29,269.49 | 29,269.49 |

Forwarded Sheet 43.

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|---------|---|-------------------|-------|-----------|-----------|---------------------|
| | 1931 | | | | | | |
| | June 25 | Balance Brought Forward | | | | 20,269.49 | 20,269.49 |
| 9038 I | June 30 | 12M Washington Md | 7 | | 270.00 | | |
| " | | 50M State of West Va | 7 | | 1,000.00 | | |
| " | | 20M State of Tenn | 7 | | 1,327.50 | | |
| " | | 6M State of Montana | 7 | | 165.00 | | |
| " | | 21M State of N J | 7 | | 446.25 | | |
| " | | 6M State of North Carolina | 7 | | 135.00 | | |
| " | | 25M " | 7 | | 562.50 | | |
| " | | 150M State of N J | 7 | | 3,187.50 | | |
| " | | 1M Hudson County N J | 7 | | 22.50 | | |
| " | | 10M County of Sumter S C | 7 | | 250.00 | | |
| " | | 12M County of Spokane Wash | 7 | | 285.00 | | |
| " | | 12M East Bay Municipal Utility, Dist of Calif | | | 300.00 | | |
| " | | 3M Hudson County N J | 7 | | 67.50 | | |
| " | | 4M " | 7 | | 100.00 | | |
| " | | 1M " | 7 | | 22.50 | | |
| " | | 13M " | 7 | | 292.50 | | |
| " | | 1M " | 7 | | 22.50 | | |
| " | | 10M City of Trenton N J | 7 | | 225.00 | | |
| " | | 9M City of Richmond Va | 7 | | 202.50 | | |
| " | | 3M " | 7 | | 67.50 | | |
| " | | 38M City of Phil Pa | 7 | | 807.50 | | |
| " | | 19M City of Phil Pa | 7 | | 403.75 | | |
| " | | Int 4 mos 2 days on \$75M City of Phil Pa | 7 | | 1,080.00 | | |
| " | | 25M City of Milw | 7 | | 562.50 | | |
| " | | 33M City of " | 7 | | 742.50 | | |
| " | | 23M City of Memphis Tenn | 7 | | 575.00 | | |
| " | | 1M " | 7 | | 23.75 | | |
| " | | 1M " | 7 | | 25.00 | | |
| " | | 20M City of Kansas City Miss | 7 | | 450.00 | | |
| " | | 10M " | 7 | | 225.00 | | |
| " | | 12M City of Greenville S C | 7 | | 270.00 | | |
| " | | 12M City of Dubuque Iowa | 7 | | 270.00 | | |
| " | | 41M City of Detroit Mich | 7 | | 247.50 | | |
| " | | 25M City of " | 7 | | 531.25 | | |
| " | | 1M " | 7 | | 22.50 | | |
| " | | 2M City of Chicago Ill | 7 | | 40.00 | 44,486.99 | 44,486.99 |
| 9038 I | Jun 30 | Divd 31 Guaranty Tr Co of N Y | 6 | | 155.00 | 44,641.99 | 44,641.99 |
| 9038 I | Jun 30 | Divd 14000 British Amer Tob Co Ltd | 3 | | 2,835.00 | 47,476.99 | 47,476.99 |
| 9038 I | Jul 1 | Divd 594 Lehigh Valley Coal Corp Pfd | 6 | | 445.50 | 47,922.49 | 47,922.49 |
| 9038 I | Jul 1 | 1629 3/5 U S Tob Co Com | 6 | | 1,791.90 | | |
| " | | 11657 62/100 Duke Pr Co Cap | 6 | | 14,571.25 | | |
| " | | 1258 Durham Holding Corp Com | 6 | | 1,258.00 | 65,543.64 | |

Forwarded Sheet 44

Petitioners' Exhibit 4.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|---|----------------|--------|----------|-----------|------------------|
| | 1931 | | | | | | |
| | Jul 1 | Balance Brought Forward | | | | 65,543.64 | 65,543.64 |
| 9038 I | Jul 1 | 3300 Texas Corp Cap | 6 | | 1,650.00 | 67,193.64 | 67,193.64 |
| 9038 I | Jul 1 | 603 Aluminum Co of America Pfd | 6 | | 904.50 | 68,098.14 | 68,098.14 |
| 9038 I | Jul 1 | 997 Cannon Mills Co Com | 6 | | 398.80 | 68,496.94 | 68,496.94 |
| 9038 I | Jul 1 | 125 Durham & South Ry Co | 6 | | 312.50 | 68,809.44 | 68,809.44 |
| 9038 I | Jul 2 | Divd 25 Erwin Cotton Mills Co | 6 | | 75.00 | 68,884.44 | 68,884.44 |
| 9038 I | Jul 3 | Aced int fr 4/1/31 to 7/3/31 12M County of Duval of Florida Spl | | | 153.33 | 69,037.77 | 69,037.77 |
| 9038 I | Jul 6 | Aced int fr 2/1/31 to 7/6/31 7M City of Phil 4s due 2/1/33 | 23 | 3.89 | | | |
| " | | Aced int fr 1/1/31 to 7/6/31 2M City of Phil 4s due 7/1/80/50 | 23 | 12.78 | | 69,021.10 | 69,021.10 |
| 9038 I | Jul 13 | 125 Piedmont & North Rwy Co Cap | 6 | | 156.25 | 69,177.35 | 69,177.35 |
| 9038 I | Jul 15 | 1M City of Troy N Y | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| " | | 1M " | 8 | | 20.00 | | |
| 9038 I | Jul 17 | Proceeds 7/1/31 coupons detached from 12M City of Dubuque 4 1/2s bd due 1/1/40 being entered on a collection basis as no funds are available at this time | 23 | 270.00 | | 69,147.35 | 69,147.35 |
| 9038 I | Jul 20 | 12M City of Dubuque Iowa \$270.00 Less post & ins .70 | 7 | | 269.30 | 69,416.65 | 69,416.65 |
| 9038 I | Jul 21 | Aced int fr 7/1 to 7/21/31 13M Erie County N Y 3 3/4s due 7/1/52 | 24 | 27.00 | | 69,389.56 | |

Forwarded Sheet 45

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|-----------|----------|-----------|------------------|
| | 1931 | | | | | | |
| | Jul 21 | Balance Brought Forward | | | | 60,389.56 | 60,389.56 |
| 038 I | Jul 27 | Charges incurred collection \$1887.50 coupons of City of Phil | 23 | .47 | | | |
| " | | Charges incurred collection \$488.75 coupons City of Newark N J | 23 | .40 | | | |
| " | | Charges incurred collection \$3187.50 coupons State of New Jersey | 23 | .35 | | | |
| " | | Charges incurred collection \$517.50 coupons County of Hudson | 23 | .22 | | 60,388.03 | 60,388.03 |
| 038 I | Jul 31 | Paid Cordelia Biddle Robertson Gen Gdn Angler B Duke | 27 | 2,500.00 | | 66,888.03 | 60,888.03 |
| 038 I | Aug 1 | 30M City of Trenton N J | 7 | | 637.50 | | |
| " | | 65M City of Detroit Michigan | 7 | | 1,462.50 | | |
| " | | 14M " | 7 | | 297.50 | | |
| " | | 25M " | 7 | | 531.25 | | |
| " | | 1M " | 7 | | 21.25 | 60,838.03 | 60,838.03 |
| 038 I | Aug 1 | 1875 American Machine & Fdry Co Com | 6 | | 656.25 | 70,494.28 | 70,494.28 |
| 038 I | Aug 17 | Accd int fr 6/1 to 8/11/31 17M City of Newark 4s due 6/1/56 | 23 | 132.22 | | | |
| | | Bt 17M City of Newark N J 4s due 6/1/56 3.85 basis net and int | | 17,404.40 | | 52,957.06 | 52,957.06 |
| 038 I | Aug 12 | Accd int fr 6/1/31 to 8/12/31 \$51M City of Newark N J 4s due 6/1/66 67.70 | 23 | 402.33 | | | |
| | | Bt 51M City of Newark N J 4s due 6M at 6/1/66 25M 6/1/67 20M 6/1/70 | 20 | 52,241.06 | | 313.67 | 313.67 |
| 038 I | Aug 15 | 8M State of Tenn | 7 | | 180.00 | 493.67 | 493.67 |
| 038 I | Aug 20 | Charges incurred coll \$637.50 coupons of City of Trenton N J | 23 | .22 | | 493.45 | 493.45 |
| 038 I | Sep 1 | 5M State of Missouri | 7 | | 100.25 | | |
| " | | 3M County of Guilford N C | 7 | | 78.75 | | |
| " | | 3M " | 7 | | 78.75 | | |
| " | | 3M City of Toledo Ohio | 7 | | 60.00 | | |
| " | | 2M " | 7 | | 40.00 | | |
| " | | 1M " | 7 | | 22.50 | | |
| " | | 2M " | 7 | | 40.00 | | |
| " | | 3M " | 7 | | 60.00 | | |
| " | | 5M " | 7 | | 100.00 | | |
| " | | 5M City of Oklahoma | 7 | | 125.00 | 1,204.70 | |

Forwarded Sheet 46

Petitioners' Exhibit 4.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Sep 1 | Balance Brought Forward | | | | 1,204.70 | 1,204.70 |
| 9038 I | Sep 1 | 10M City of Oklahoma | 7 | | 250.00 | | |
| " | | 25M City of Nashville Tenn | 7 | | 625.00 | | |
| " | | 3M City of Minneapolis Minn | 7 | | 60.00 | | |
| " | | 19M " " | 7 | | 380.00 | | |
| " | | 2M " " | 7 | | 40.00 | | |
| " | | 4M " " | 7 | | 940.00 | | |
| " | | 6M City of Los Angeles Calif | 7 | | 142.50 | | |
| " | | 20M City of Balt Md | 7 | | 400.00 | 4,042.20 | 4,042.20 |
| 9038 I | Sep 1 | Divd 1500 Liggett & Myers Tobacco Co Com | 6 | | 1,500.00 | | |
| " | | Divd 1100 " " | 6 | | 1,100.00 | 8,642.20 | 6,642.20 |
| 9038 I | Sep 5 | Reed from Estate of Angler B Duke being 1/4 sh proceeds sale 2 tickets Natl Mens Championship West Side Tennis Club | 12 | | 5.00 | | |
| " | | Reed from Estate of Angler B Duke being 6 mos Int ending Aug 31 1931 on 110M N Y C 4 1/2 % bonds held by N Y State Tax Commission | 8 | | 584.38 | 7,231.58 | 7,231.58 |
| 9038 I | Sep 12 | Paid Coll Int Rev 3rd quarterly installment 1930 Fed Inc Tax on undistributed income | 27 | 3,385.01 | | 3,845.67 | 3,845.67 |
| 9038 I | Sep 15 | 87 Stand Oil Co of Ind | 6 | | 21.75 | 3,867.42 | 3,867.42 |
| 9038 I | Sep 16 | Charges coll \$400 coupons City of Balt | 23 | .40 | | 3,867.02 | 3,867.02 |
| 9038 I | Sep 30 | Divd 31 Guaranty Tr Co of N Y | 6 | | 155.00 | 4,022.02 | 4,022.02 |
| 9038 I | Sep 30 | 140M British Amer Tob Co Ltd | 3 | | 2,362.50 | 6,384.52 | 6,384.52 |
| 9038 I | Oct 1 | 4M State of Oregon | 7 | | 90.00 | | |
| | | 5M State of " " | 7 | | 112.50 | | |
| | | 3M " " | 7 | | 67.50 | | |
| | | 2M Hud & Man R R Co | 1 | | 50.00 | | |
| | | 25M County of Erie N Y | 8 | | 531.25 | | |
| | | 25M City of Yonkers N Y | 8 | | 562.50 | | |
| | | 45M City of St. Louis Mo | 7 | | 956.25 | | |
| | | 12M City of Balt Md | 7 | | 240.00 | 8,994.52 | 8,994.52 |
| 9038 I | Oct 1 | 1629 3/5 shrs United States Tob Co | 6 | | 1,791.90 | 10,786.42 | 10,786.42 |
| 9038 I | Oct 1 | 3300 Shrs Tex Corp | 6 | | 1,650.00 | | |
| | | 11657 & 62 100 shrs Duke Pr Co | 6 | | 14,571.25 | 27,007.67 | 27,007.67 |
| 9038 I | Oct 1 | 907 shrs Cannon MI Ls Co | 6 | | 398.80 | | |
| | | Divd 594 Lehigh Valley Coal Corp Pfd | 6 | | 445.50 | 27,851.97 | 27,851.97 |
| 9038 I | Oct 1 | Divd 125 Durham and So Ry Co Fidelity Bk of Durham | 6 | | 312.50 | 28,164.47 | |

Forwarded to Sheet 47

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|--|----------------|-----------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Oct 1 | Brought Forward | | | | 28,164.47 | 28,164.47 |
| 038 I | Oct 1 | 603 shrs Aluminum Co of Amer | 6 | | 904.50 | 29,068.97 | 29,068.97 |
| 038 I | Oct 2 | 1258 shrs Durham Holding Corp | 6 | | 1,258.00 | 30,326.97 | 30,326.97 |
| 038 I | Oct 13 | 125 shrs Piedmont & Northern Ry Co | 6 | | 156.25 | 30,483.22 | 30,483.22 |
| 038 I | Oct 13 | Charges incurred in coll of \$531.25 cps of Co of Erie | 24 | 22 | | 30,483.00 | 30,483.00 |
| 038 I | Oct 15 | 12M City of N Y | 8 | | 255.00 | 30,738.00 | 30,738.00 |
| 038 I | Oct 22 | Charges incurred in coll of \$562.50 cps of the City of Yonkers N Y | 22 | 22 | | 30,737.78 | 30,737.78 |
| 038 U | Oct 31 | Paid Cordella Biddle Robertson Genl Gdn Angler B Duke | 27 | 2,500.00 | | 28,237.78 | 28,237.78 |
| 038 I | Oct 31 | 12M County of Georgetown S C | 7 | | 360.00 | 28,597.78 | 28,597.78 |
| 038 I | Nov 2 | 10M City of Jersey City N J | 7 | | 225.00 | | |
| | | 4M City of New Rochelle N Y | 8 | | 80.00 | | |
| | | 25M City of Norfolk Va | 7 | | 625.00 | | |
| | | 6M Fed Land Bk of New Orleans Fed Farm Loan | 9 | | 135.00 | | |
| | | 6M Fed Land Bk of Houston | 9 | | 135.00 | | |
| | | 5M Mayor & Council of Wilmington Del | 7 | | 112.50 | | |
| | | 7M Mayor & Council of Wilmington Del | 7 | | 157.50 | | |
| | | 3M Town of Kearny N J | 7 | | 67.50 | | |
| | | 9M Town of Kearny N J | 7 | | 202.50 | | |
| | | 12M Washington Md | 7 | | 270.00 | | |
| | | | | | | 30,607.78 | 30,607.78 |
| 038 I | Nov 2 | 1875 shrs Amer Machine & Fdry Co | 6 | | 656.25 | 31,264.03 | 31,264.03 |
| 038 I | Nov 11 | Recd from Est of Angler B Duke refund of interest assessed by & paid to Coll Int Rev on Deficiency Estate Tax 1928 | | | | | |
| | | 61895.40 | | | | | |
| | | Accd int on same | | | | | |
| | | 11426.06 | | | | | |
| | | | | | | | |
| | | 73321.46 | | | | | |
| | | Less amt paid Carlin & Rover for collecting same | | | | | |
| | | 14664.29 | | | | | |
| | | | | | | | |
| | | 58657.17 | | | | | |
| 038 I | Nov 13 | ¼th thereof due inc of this tr | 12 | | 14,664.30 | 45,928.33 | 45,928.33 |
| | | Bt 32M City of Newark N J 4s due June 1/58 | | | | | |
| | | 4¼ basis less ¼ net & int | 27 | 30,653.38 | | | |
| | | Accd int from June 1/31 to Nov 13/31 | | 576.00 | | 14,398.95 | 14,698.95 |
| 038 I | Nov 14 | 728 shrs Erwin Cotton Mills Co | 6 | | 1,092.00 | 15,790.95 | 15,790.95 |
| 038 I | Nov 16 | 47M City of Detroit Mich | 7 | | 940.00 | | |
| | | 10M City of Newark N J | 7 | | 212.50 | | |
| | | 18M City of Newark N J | 7 | | 382.50 | | |
| | | 12M City of " | 7 | | 255.00 | | |
| | | 10M " | 7 | | 212.50 | | |
| | | 6M Hudson County N J | 7 | | 135.00 | | |
| | | 15M Hudson County N J | 7 | | 337.50 | | |
| | | 4M Hudson County N J | 7 | | 60.00 | 18,355.95 | |

Petitioners' Exhibit 4.

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| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|---|----------------|----------|----------|-----------|------------------|
| | 1931 | | | | | | |
| 9038 I | Nov 16 | Brought Forward | | | | 18,355.95 | 18,355.95 |
| 9038 K | Nov 16 | 25M Hudson County N J | 7 | | 562.50 | | |
| | | 8M " | 7 | | 180.00 | | |
| | | 5M " | 7 | | 112.50 | | |
| | | 5M " | 7 | | 112.50 | 19,323.45 | 19,323.45 |
| 9038 I | Nov 28 | Charges incurred in the collection of \$1062.50 coupons of the City of Newark N J | 23 | .25 | | | |
| | | Charges incurred in the collection of \$1125 coupons of the County of Hudson | 23 | .25 | | 19,322.95 | 19,322.95 |
| 9038 I | Dec 1 | 27M Westchester Co N Y | 8 | | 540.00 | | |
| | | 6M Miami Conservancy District | 7 | | 165.00 | | |
| | | 3M County of Westchester N Y | 8 | | 67.50 | | |
| | | 31M " | 8 | | 620.00 | | |
| | | 1M County of Westchester N Y | 8 | | 25.50 | | |
| | | 6M " | 8 | | 135.00 | | |
| | | 12M County of Mecklenburg N C | 7 | | 285.00 | | |
| | | 34M City of N Y | 8 | | 722.50 | | |
| | | 16M City of N Y | 8 | | 340.00 | | |
| | | 20M City of Newark N J | 7 | | 400.00 | | |
| | | 25M " | 7 | | 500.00 | | |
| | | 6M City of Newark N J | 7 | | 120.00 | | |
| | | 17M City of Newark N J | 7 | | 340.00 | | |
| | | 15M City of Detroit | 7 | | 318.75 | | |
| | | 10M City of Detroit | 7 | | 212.50 | | |
| | | 12M City of Detroit Mich | 7 | | 255.00 | 24,366.70 | 24,366.70 |
| 9038 I | Dec 1 | Divd 1500 Liggett & Myers Tob Co Com | 6 | | 1,500.00 | | |
| | | 32M City of Newark N J | 7 | | 640.00 | 26,506.70 | 26,506.70 |
| 9038 I | Dec 1 | Divd 1100 Liggett & Myers Tobacco Co | 6 | | 1,100.00 | 27,606.70 | 27,606.70 |
| 9038 I | Dec 2 | 10M City of Cleveland Ohio | 7 | | 225.00 | | |
| | | 1M City of " | 7 | | 22.50 | 27,854.20 | 27,854.20 |
| 9038 I | Dec 9 | Charges incurred in coll of \$640' cpns of City of Newark | 23 | .22 | | | |
| | | Charges incurred in coll of \$540 cpns of County of Westchester | 24 | .22 | | | |
| | | Charges incurred in coll of \$620 cpns of Co of Westchester | 24 | .22 | | | |
| | | Charges incurred in coll of \$1360 cpns of City of Newark N J | 22 | .26 | | 27,853.28 | 27,853.28 |
| 9038 I | Dec 12 | Paid Coll of Int Rev final installment 1930 | | | | | |
| | | Fed Income Tax on Undistributed Income | 27 | 3,385.01 | | 24,467.37 | 24,467.37 |
| 9038 I | Dec 15 | 8M County of Fairfax Va | 7 | | 200.00 | | |
| | | 4M City of Newark N J | 7 | | 85.00 | | |
| | | 19M City of Newark N J | 7 | | 403.75 | | |
| | | 8M City of Detroit Mich | 7 | | 170.00 | | |
| | | 17M City of Detroit Mich | 7 | | 361.25 | | |
| | | 20M City of Detroit Mich | 7 | | 450.00 | 26,137.37 | 26,137.37 |
| 9038 I | Dec 15 | 87 shrs Std Oil Co of Indiana | 6 | | 21.75 | 26,159.12 | |

Balance Forwarded to Page 49

Petitioners' Exhibit 4.

| Trust No. | Date | ITEMS | Voucher Number | Debit | Credit | Balance | Previous Balance |
|-----------|--------|---|----------------|-------|-----------|-----------|------------------|
| | 1931 | | | | | | |
| | Dec 15 | Balance Brought Forward | | | | | 26,150.12 |
| 038 I | Dec 16 | Dividend on 1750 Tobacco Sec Tr Co Ltd deferred reg shs | 3 | | 117.25 | 26,276.37 | 26,276.37 |
| 038 I | Dec 16 | Dividend on 1750 Tobacco Sec Tr Co Ltd ord reg shs Amer Dep Rec | 3 | | 500.00 | 26,836.37 | 26,836.37 |
| 038 I | Dec 18 | Interest to November 22 1931 on balance | 2 | | 302.17 | 27,138.54 | 27,138.54 |
| 038 I | Dec 26 | Div 728 shs Erwin Cotton Mills Co | 6 | | 1,092.00 | 28,230.54 | 28,230.54 |
| 038 I | Dec 31 | Div 31 shs Guaranty Trust Co of N Y | 6 | | 155.00 | 28,385.54 | 28,385.54 |
| | 1932 | | | | | | |
| 038 I | Jan 2 | Int \$12000 Washington Md Suburban Sanitary Dist Ser F | 7 | | 270.00 | | |
| | | Int \$50000 State of West Virginia | 7 | | 1,000.00 | | |
| | | Int \$59000 State of Tennessee Highway Notes | 7 | | 1,327.50 | | |
| | | Int \$6000 State of No Carolina | 7 | | 135.00 | | |
| | | Int \$25000 State of No Carolina | 7 | | 562.50 | | |
| | | Int \$150000 State of N J State Hwy Fd A/C of 1932 Ser F Road | 7 | | 3,187.50 | | |
| | | Int \$21000 State of N J State Hwy Fund Bdge Ser E | 7 | | 446.25 | | |
| | | Int \$12000 East Bay Municipal Utility Dist of Calif Water | 7 | | 300.00 | | |
| | | Int \$1000 Hudson Co N J Newark Turnpike Imp | 7 | | 22.50 | | |
| | | Int \$1000 Hudson Co N J Newark Turnpike Imp | 7 | | 22.50 | | |
| | | Int \$4000 Hudson Co N J Hospital for Insane | 7 | | 90.00 | | |
| | | Int \$13000 Hudson County N J Road | 7 | | 292.50 | | |
| | | Int \$10000 County of Sumter S C | 7 | | 250.00 | | |
| | | Int \$12000 County of Spokane Wash | 7 | | 285.00 | | |
| | | Int \$10000 City of Trenton N J | 7 | | 225.00 | | |
| | | Int \$3000 City of Richmond Va | 7 | | 67.50 | | |
| | | Int \$9000 City of Richmond Va | 7 | | 202.50 | | |
| | | Int \$7000 City of Phila | 7 | | 140.00 | | |
| | | Int \$2000 City of Phila | 7 | | 40.00 | | |
| | | Int \$38000 City of Phila Pa | 7 | | 807.50 | | |
| | | Int \$19000 City of Phila Pa | 7 | | 403.75 | | |
| | | Int \$75000 " | 7 | | 1,593.75 | | |
| | | Int \$25000 City of Milw | 7 | | 502.50 | | |
| | | Int \$33000 City of Milw Wise | 7 | | 742.50 | | |
| | | Int \$23000 City of Memphis Tenn | 7 | | 575.00 | | |
| | | Int \$1000 City of " | 7 | | 23.75 | | |
| | | Int \$1000 " | 7 | | 25.00 | | |
| | | Int \$20000 City of Kansas City Mo | 7 | | 450.00 | | |
| | | Int \$10000 " | 7 | | 225.00 | | |
| | | Int \$12000 City of Greenville S C | 7 | | 270.00 | | |
| | | Int \$12000 City of Dubuque Iowa | 7 | | 270.00 | | |
| | | Int \$11000 City of Detroit Mich | 7 | | 247.50 | | |
| | | Int \$25000 City of " | 7 | | 531.25 | | |
| | | Int \$1000 City of " | 7 | | 22.50 | | |
| | | Int \$2000 City of Chic Ill | 7 | | 40.00 | 44,041.79 | 44,041.79 |
| 038 I | Jan. 2 | 11637 & 62/100 shs Duke Power Co | 6 | | 14,571.25 | | |
| | | 1929 & 3/5 shs United States Tobacco Co Com | 6 | | 1,791.90 | 60,404.94 | |

Balance Forwarded to Page 50

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Balance Forwarded to Page 51

Petitioners' Exhibit 5.

- 9037 Ttee. ANTHONY NEWTON DUKE u/w Angier B. Duke 469
- 7/25/30
P.Jacoby We today received approval of Messrs. Perkins, Allen and Halsted (Mr. Thorne being in Europe) of our suggestion to invest \$35,000 of the \$41,203.12 Income Cash balance of this Trust in suitable tax-free municipal bonds.
- 8/15/30
P.Jacoby We today received approval of J. C. Thorn of the purchase of \$15,000 City of Detroit 4 $\frac{1}{4}$ s, 1951, and \$20,000 City of Baltimore 4s, 1957.
- 11/12/30
Chapuis By signing and returning to us copy of our letter dated November 10th, Messrs. Thorne, Perkins, Allen and Halstead indicate their approval of investing the accumulated income balance of \$39,463.70 in the purchase of suitable tax-free municipal securities. 470
- 12/9/30
Chapuis By signing and returning to us copy of our letter dated December 5th, to William R. Perkins, Messrs. Thorn, Perkins, Allen and Halsted indicate their approval of the sale of 3/6th of a share of the Standard Oil Company of Indiana Capital stock.
- 1/14/31
Chapuis By signing and returning to us copy of our letter dated January 9th, to William R. Perkins, the former executors, Messrs. Allen, Thorn and Halsted approves of the sale of \$6,000 Par Value Board of Education of the City School District of the City of Cleveland, Ohio 6s due June 1st, 1932 and 1933 to raise in the neighborhood of \$60,000 in order to make payments ordered in the decree of the Surrogate's Court settling the account of the trustee. 471

Petitioners' Exhibit 5.

472 2/3/31
PJacoby

At a meeting of the OFFICERS' INVESTMENT COMMITTEE held today—Messrs. Cardozo, Anderson, Kilbreth, and Jacoby present—this account was reviewed.

2/5/31
PJacoby

INVESTMENT COMMITTEE reviewed this account.

2/10/31
RLGould

Under date of 2/9, W. R. Perkins acknowledged our letter of the 6th inst. and says: "The executors have no comments to make". Our letter of the 6th stated that our Committee had reviewed the securities and no changes were recommended.

473 3/10/31
FWFohey

By signing the copy of our letter of February 27th, Messrs. Perkins, Allen and Thorne approve of purchasing tax-free municipal issues with the accumulated income balance of approximately \$60,000 now on hand.

3/20/31
Chapuis

Copy of our letter March 18th to Mr. Perkins returned with Mr. Halsted's signature affixed thereto, signifying his approval of the purchase of \$74,000 City of Philadelphia, Pa. 4 $\frac{1}{4}$ s due 2/27/81/51 for the investment of the income cash on hand.

474 5/27/31
Chapuis

Our letter dated May 19th to Mr. W. R. Perkins returned with his signature and those of Messrs. Allen, Thorn and Halsted affixed thereto indicating their approval of the purchase of suitable tax free municipals to replace the \$6000 State of Montana 5 $\frac{1}{2}$ s due July 1, 1941 which have been called for payment July 1, 1931 at Par.

7/9/31
Chapuis

Copy of our letter dated July 6th to Mr. William R. Perkins returned with his and the

Petitioners' Exhibit 5.

other former executors' signatures affixed thereto indicating their approval of the purchase of tax frees for the reinvestment of the funds received through the sale of \$12,000 County of Duval 5s due 1950 which bonds we advised were sold at a price of 98 $\frac{1}{4}$ net. 475

7/9/31
FWFohey

By signing copy of our letter of 6/26, Messrs. Thorne, Perkins, Allen & Halsted approve of offering for redemption at a price not under par, \$12,000 Duval County Florida Special Tax School District #1 5% bonds. They indicate, however, that they do not desire the Trust to take a loss on the bonds. Inasmuch as our inventory price is 100, there will be no loss if the price of par or better is obtained. Orders were given to Mr. DiPosch with instructions of Mr. Anderson—Price of 98 $\frac{1}{4}$ was offered, which we accepted. 476

8/7/31
FWFohey

Letter dated 8/6, W. R. Perkins' secretary returns to us the duplicate copy of our communication of 8/5 with the signatures of Messrs. Allen and Halsted affixed thereto, as an indication that they approve of investing the accumulated income balance now on hand in suitable tax-free municipal securities. Mr. Perkins' secretary advises us that Messrs. Thorne and Perkins are out of the city at the present time which accounts for their not signing the duplicate. 477

Page 2

9037 Ttee. ANTHONY NEWTON DUKE u/w Angier B. Duke

8/20/31
RLGould

INVESTMENT COMMITTEE reviewed this trust and recommended that a check be made of

Petitioners' Exhibit 5.

478

the present condition of the less well-known municipal issues including particularly county bonds.

9/4/31
RLGould

Under date of September 3rd, Mr. W. R. Perkins has answered our inquiry of September 2nd, in reference to the sale of the warrants expiring Oct. 1 on the Aluminium, Ltd. stock. He says: "Replying to yours of the 2nd, do you consider yourselves authorized by the terms of the Trust to exercise these warrants and make that kind of an investment? While we think well of the future of the company and realize what we hope is the abnormal lowness of all things now, it is not an investment for trust funds." We are accordingly proceeding to sell the warrants.

479

9/10/31
RLGould

A list of municipal issues to which reference was made by the Investment Committee 8/20/31 was submitted to O W Anderson.

10/1/31
FWFohey

Letter dated 9/29, W R Perkins advises that he agrees with our opinion that it would be well to await developments before depositing City of Asheville NC bonds with Protective Committee.

480

10/16/31
Chapuis

Referring to our diary of August 7th, we have received Messrs. Thorne and Perkins approval by signing and returning copy of our letter dated August 15th.

11/9/31
FWFohey

By signing copy of our letter of 11/5, Messrs. Perkins, Thorne, Allen and Halsted approve of purchasing additional tax-free state or municipal securities with the accumulated income balance on hand.

Petitioners' Exhibit 5.

12/17/31
Chapuis

The American Tobacco Company has authorized Clark Dodge and Co. to purchase until December 21st the common stock at \$80 per share of the American Cigar Company. On December 12th we advised Mr. William R. Perkins of this and he returned letter with his signature and those of the other three former executors affixed thereto indicating that they favor accepting the offer for the 100 shares held in each account.

481

12/29/31
Chapuis

Copy of our letter dated December 21st to William R. Perkins returned with his signature and those of the other three former executors affixed thereto indicating their approval of the purchase of State or Municipal issues exempt from Federal Income tax with the funds made available through the sale of 100 shares of American Cigar Company Common and the income balance of \$24,476.87.

482

1/12/32
Jacoby

At a meeting of the OFFICERS' INVESTMENT COMMITTEE held today—Messrs. Hoyt, Knox, Anderson, Torrance and Jacoby present—this account was reviewed.

1/4/32
FWFohey

Under date of 12/28, Forrest Hyde advises that our letter of the 16th, addressed to W R Perkins, has been referred to him for reply. Our letter of which he speaks was a formal advice that the Lehigh Valley Coal Corp had omitted the dividend ordinarily payable 1/1 on the Preferred stock. In this connection, Mr. Hyde points out that the market value of this stock is approx. \$8 a shr and even though the dividend has been passed "We see no reason to liquidate it at these levels. If you know of any reason that it should be

483

Petitioners' Exhibit 5.

484

liquidated, I will appreciate your letting me know." In reply, under date 12/31, we are giving a brief resumé of the operations of the corporation and are advising that we quite agree with Mr. Perkins' opinion that retention of the holding for the present seems justified pending further developments. (per Mr. O W Anderson).

2/4/32
FWFohey

By signing copy of our letter of 1/28, Messrs. Perkins, Allen, Thorne and Halsted approve of purchasing high grade state or municipal issues with the accumulated income balance on hand in the trust.

485

1/26/32
Jacoby

At a meeting of the Officers' Investment Committee held today—Messrs. Hoyt, Knox, Kilbreth, Anderson, Torrance and Jacoby present—the committee reviewed an order which had previously been placed, at the price shown below, to sell the following security but in view of the subsequent decline in market levels, it was deemed advisable to write the executors suggesting the cancellation of this order, pending developments:—

540 Shrs. Duke Power Co. Common
at 270

486

2/17/32
G.W.Meyding

By signing copy of our letter of February 17, 1932, Messrs. Perkins, Allen, Halsted and Thorne approve of cancelling the order placed some time ago for the sale of 540 shares of Duke Power Co. Capital stock, at a price of 270 or better.

(Continued on next page)

Petitioners' Exhibit C.

487

9038 Ttee. ANGIER B. DUKE, Jr. u/w Angier B. Duke

7/25/30 We today received approval of Messrs.
PJacoby Perkins, Allen and Halsted (Mr. Thorne being in Europe) of our suggestion to invest \$35,000 of the \$40,603.91 Income Cash balance of this Trust in suitable tax-free municipal bonds.

8/15/30 We today received approval of J. C. Thorn
PJacoby of the purchase of \$15,000 City of Detroit 4 1/4s, 1951, and \$20,000 City of Baltimore 4s, 1957.

488

11/12/30 By signing and returning to us copy of our
Chapuis letter dated November 10th, Messrs. Thorne, Perkins, Allen and Halstead indicate their approval of investing the accumulated income balance of \$37,767.79 in the purchase of suitable tax-free municipal securities.

12/9/30 By signing and returning to us copy of our
Chapuis letter dated December 5th, to William R. Perkins, Messrs. Thorn, Perkins, Allen and Halsted indicate their approval of the sale of 3/6th of a share of the Standard Oil Company of Indiana Capital stock.

489

1/14/31 By signing and returning to us copy of our
Chapuis letter dated January 9th, to William R. Perkins, the former executors, Messrs. Allen, Thorn and Halsted approves of the sale of \$6,000 Par Value Board of Education of the City School District of the City of Cleveland, Ohio 6s due June 1st, 1932 and 1933 to raise in the neighborhood of \$60,000 in order to make payments ordered in the decree of the

Petitioners' Exhibit 6.

490

Surrogate's Court settling the account of the trustee.

2/3/31
PJacoby

At a meeting of the OFFICERS' INVESTMENT COMMITTEE held today—Messrs. Cardozo, Anderson, Kilbreth, and Jacoby present—this account was reviewed.

2/5/31
PJacoby

INVESTMENT COMMITTEE reviewed this account.

2/10/31
RLGould

Under date of 2/9, W. R. Perkins acknowledged our letter of the 6th inst. and says: "The executors have no comments to make". Our letter of the 6th stated that our Committee had reviewed the securities and no changes were recommended.

491

3/10/31
FWFohey

By signing the copy of our letter of February 27th, Messrs. Perkins, Allen and Thorne approve of purchasing tax-free municipal issues with the accumulated income balance of approximately \$60,000 now on hand.

3/20/31
Chapuis

Copy of our letter to Mr. Perkins returned with Mr. Halsted's signature affixed thereto, signifying his approval of the purchase of \$75,000 City of Philadelphia, Pa. 4¼s due 2/27/81/51 for the investment of the income cash on hand.

492

5/27/31
Chapuis

Our letter dated May 19th to Mr. W. R. Perkins returned with his signature and those of Messrs. Allen, Thorn and Halsted affixed thereto indicating their approval of the purchase of suitable tax free municipals to replace the \$6000 State of Montana 5½s due July 1, 1941 which have been called for payment July 1, 1931 at Par.

Petitioners' Exhibit 6.

6/19/31
Chapuis

Our letter dated June 15th to Mr. W. R. Perkins returned with his signature and those of Messrs. Allen, Thorn and Halsted affixed thereto indicating their approval of the purchase of suitable tax free municipals to replace the \$4000 Hudson County New Jersey 4½s which mature July 1st, 1931. 493

7/9/31
Chapuis

Copy of our letter dated 7/6 to William R. Perkins returned with his and the other former executors' signatures affixed thereto indicating their approval of the purchase of tax frees for the reinvestment of the funds received through the sale of \$12,000 County of Duval 5s, due 1950, which bonds we advised were sold at a price of 98¼ net. 494

7/9/31
FWFohey

By signing copy of our letter of 6/26, Messrs. Thorne, Perkins, Allen & Halsted approve of offering for redemption at a price not under par, \$12,000 Duval County Florida Special Tax School District #1 5% bonds. They indicate, however, that they do not desire the Trust to take a loss on the bonds. Inasmuch as our inventory price is 100, there will be no loss if the price of par or better is obtained. Orders were given to Mr. DiPosch with instructions of Mr. Anderson—Price of 98¼ was offered, which we accepted. 495

9038 Ttee. ANGIER B./DUKE, Jr. u/w Angier B. Duke

8/7/31
FWFohey

Letter dated 8/6, W. R. Perkins' secretary returns to us the duplicate copy of our communication of 8/5 with the signatures of Mr. Allen and Mr. Halsted affixed thereto, as an indication that they approve of investing the accumulated income balance now on hand in

Petitioners' Exhibit 6.

496

suitable tax-free municipal securities. Mr. Perkins' secretary advises us that Messrs. Thorne and Perkins are out of the city at the present time, which accounts for their not signing the duplicate.

8/20/31
RLGould

INVESTMENT COMMITTEE reviewed this trust and recommended that a check be made of the present condition of the less well known municipal issues, including particularly county bonds.

497

9/4/31
RLGould

Under date of September 3rd, Mr. W. R. Perkins has answered our inquiry of September 2nd, in reference to the sale of the warrants expiring Oct. 1. on the Aluminium, Ltd. stock. He says "Replying to yours of the 2nd, do you consider yourselves authorized by the terms of the Trust to exercise these warrants and make that kind of an investment. While we think well of the future of the company and realize what we hope is the abnormal lowness of all things now, it is not an investment for trust funds." We are accordingly proceeding to sell the warrants.

498

9/10/31
RLGould

A list of municipal issues to which reference was made by the Investment Committee 8/20/31 was submitted to O W Anderson.

10/1/31
FWFohey

Letter dated 9/29, W R Perkins advises that he agrees with our opinion that it would be well to await developments before depositing City of Asheville NC bonds with Protective Committee.

10/16/31
Chapuis

Referring to our diary of August 7th, we have received Messrs. Thorne and Perkins

Petitioners' Exhibit 6.

approval by signing and returning copy of our letter dated August 15th. 499

11/9/31
FWFohey

By signing copy of our letter of 11/5, Messrs. Perkins, Thorne, Allen and Halsted approve of purchasing additional tax-free state or municipal securities with the accumulated income balance on hand.

12/17/31
Chapuis

The American Tobacco Company has authorized Clark Dodge and Co. to purchase until December 21st the common stock at \$80 per share of the American Cigar Company. On December 12th we advised Mr. William R. Perkins of this and he returned letter with his signature and those of the other three former executors affixed thereto indicating that they favor accepting the offer for the 100 shares held in each account. 500

12/29/31
Chapuis

Copy of our letter dated December 21st to William R. Perkins returned with his signature and those of the other three former executors affixed thereto indicating their approval of the purchase of State or Municipal issues exempt from Federal Income tax with the funds made available through the sale of 100 shares of American Cigar Company Common and the income balance of \$28,230.54. 501

1/12/32
Jacoby

At a meeting of the OFFICERS' INVESTMENT COMMITTEE held today—Messrs. Hoyt, Knox, Anderson, Torrance and Jacoby present—this account was reviewed.

1/4/32
FWFohey

Under date of 12/28, Forrest Hyde advises that our letter of the 16th addressed to W R Perkins has been referred to him for reply. Our letter of which he speaks was a formal

Petitioners' Exhibit 6.

502

advice that the Lehigh Valley Coal Corp had omitted the dividend ordinarily payable January 1st on the Preferred stock. In this connection, Mr. Hyde points out that the market value of this stock is approx. \$8 a shr. and even though the dividend has been passed "We see no reason to liquidate it at these levels. If you know of any reason that it should be liquidated, I will appreciate your letting me know." In reply, under date of 12/31, we are giving a brief resumé of the operations of the corporation and are advising that we quite agree with Mr. Perkins' opinion that retention of the holding for the present seems justified pending further developments (per Mr. O. W. Anderson).

503

2/4/32
FWFohey

By signing copy of our letter of 1/28, Messrs. Perkins, Allen, Thorne and Halsted approve of purchasing high grade State or Municipal issues with the accumulated income balance on hand in the trust.

504

Stipulation Relating to Printing of Record.

505

**IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

B. T. A. No. 76031.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of ANGIER
B. DUKE, Deceased, for the Benefit of ANTHONY NEW-
TON DUKE,

Petitioner,

506

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

B. T. A. No. 76046.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of ANGIER
B. DUKE, Deceased, for the Benefit of ANGIER B.
DUKE, JR.,

Petitioner,

507

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

IT IS STIPULATED AND AGREED between the parties to the
above-entitled cases, by their undersigned counsel, subject
to the approval of the Court, that in printing the con

Stipulation Relating to Printing of Record.

508 solidated record of said cases, as certified by the Clerk of the United States Board of Tax Appeals and filed in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit, the following pages of such certified record may be omitted:

Pages 123, 124, 125, 126, 127, 129, 130, 131, 132, 133, 135, 137, 138, 139, 140, 141, 142, 144, 146, 147, 148, 149, 150, 151 and 152, which excluded pages are parts of the income tax returns, Respondent's Exhibits "A", "B", "C" and "D", consisting of schedules and instructions, and contain no factual matter which is relevant or material to the issues on review, or factual data not otherwise appearing in the record as modified by this stipulation.

509

IT IS FURTHER STIPULATED AND AGREED that in lieu of the information shown on page 123 of the certified record there be printed, immediately following the printing of page 122 thereof, a statement that Schedule "E" of the return, omitted from the printed record, shows the receipt of \$71,833.26 from obligations of a state, territory or political subdivision thereof, and the receipt of \$513.51 from Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions; and that in lieu of the information shown on page 129 of the certified record there be printed, immediately following the printing of page 128 thereof, a statement that Schedule "E" of the return, omitted from the printed record, shows the receipt of \$71,381.79 from obligations of a state, territory, or political subdivision thereof, or the District of Columbia, and the receipt of \$514.10 from Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and U. S. possessions.

510

IT IS FURTHER STIPULATED AND AGREED that if this stipulation is approved by order of the above court, a copy of this

Stipulation Relating to Printing of Record.

stipulation and the order entered thereon by said court 511
be printed as part of such record.

Dated, October 5, 1939.

GEORGE CRAVEN,
Counsel for Petitioners.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

Approved, Oct. 11, 1939.

CHARLES E. CLARK,
U. S. C. J.

512

513

514

Praeceptum for Record.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

B. T. A. Docket No. 76031.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of ANGIER
B. DUKE, Deceased, for the Benefit of ANTHONY NEW-
TON DUKE,

515

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

B. T. A. Docket No. 76046.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of ANGIER
B. DUKE, Deceased, for the Benefit of ANGIER B.
DUKE, JR.,

516

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, transmit and deliver
to the Clerk of the Circuit Court of Appeals for the Second
Circuit a consolidated transcript of the record in the above-

Praecepta for Record.

entitled cases which were consolidated by order of said Court entered on August 21, 1939, said record to be prepared and transmitted as required by law and the rules of said Court in connection with the petitions for review by said Circuit Court of Appeals heretofore filed therein by the petitioners, and you are requested to include therein copies, duly certified as correct, of the following documents and entries: 517

1. Docket entries of the ~~proceedings~~ in each case before the Board.
 2. Pleadings in each case before the Board, as follows:
 - (a) Petition, including annexed copy of deficiency notice. 518
 - (b) Answer.
 3. Motion of petitioners for consolidation of cases and notation showing that motion was granted by the Board.
 4. Findings of fact and opinion of Board.
 5. Order of Board denying petitioners' motion for rehearing and reconsideration.
 6. Decision of Board in each case.
 7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review, in each case. 519
 8. Stipulation and order of Circuit Court of Appeals for Second Circuit entered thereon for consolidation of cases.
 9. Order of Board entered in each case extending time for preparation of statement of evidence and transmission and delivery of transcript of record.
- Not included in record.

Praeceptum for Record.

- 520 10. Stipulation of facts and exhibits attached thereto.
 11. Statement of the evidence and exhibits referred to therein.
 12. This praecipe.

Dated, August 22, 1939.

GEORGE CRAVEN,
Counsel for Petitioners.

521 Service is hereby acknowledged of the foregoing praecipe this 31st day of August, 1939. No counter-praecipe will be filed.

J. P. WENCHEL,
Chief Counsel for Bureau of Internal Revenue,
Counsel for Respondents.

522

Certificate.**UNITED STATES BOARD OF TAX APPEALS****WASHINGTON**

523

Docket No. 76031.

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of ANGIER
B. DUKE, Deceased, for the Benefit of ANTHONY NEW-
TON DUKE,**

Petitioner,**—against—****COMMISSIONER OF INTERNAL REVENUE,****Respondent.****and****Docket No. 76046.**

524

**CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of ANGIER
B. DUKE, Deceased, for the Benefit of ANGIER B.
DUKE, JR.,**

Petitioner,**—against—****COMMISSIONER OF INTERNAL REVENUE,****Respondent.**

**I, B. D. Gamble, Clerk of the U. S. Board of Tax Ap-
peals, do hereby certify that the foregoing pages, 1 to 192,
inclusive, contain and are a true copy of the transcript of
record, papers, and proceedings on file and of record in my
office as called for by the Praeceptum in the appeals as above
numbered and entitled.**

525

**In testimony whereof, I hereunto set my hand and affix
the seal of the United States Board of Tax Appeals, at
Washington, in the District of Columbia, this 18th day of
Sept. 1939.**

**B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.**

(Seal)

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[fol. 176] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1939

Nos. 158-159

(Argued March 20, 1940. Decided May 27, 1940)

CITY BANK FARMERS TRUST COMPANY, as Trustee of a Trust
Under the Last Will and Testament of Angier B. Duke,
Deceased, for the Benefit of Anthony Newton Duke, Peti-
tioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

CITY BANK FARMERS TRUST COMPANY, as Trustee of Trust
Under the Last Will and Testament of Angier B. Duke,
Deceased, for the Benefit of Angier B. Duke, Jr., Peti-
tioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petitions by City Bank Farmers Trust Company as trustee of trusts under the will of Angier B. Duke, deceased, for [fol. 177] the benefit of Anthony Newton Duke and Angier B. Duke, Jr., respectively, for the review of decisions of the United States Board of Tax Appeals which determined deficiencies in income taxes for the year 1931. Decisions affirmed.

Before L. Hand, Augustus N. Hand and Chase, Circuit
Judges

Rollin Browne, George Craven and Mitchell, Taylor,
Capron & Marsh, Counsel for Petitioners.

Samuel O. Clark, Jr., Assistant Attorney General, Sewall
Key and Lee A. Jackson, Counsel for Commissioner of In-
ternal Revenue.

AUGUSTUS N. HAND, Circuit Judge:

The petitioner, a New York trust company, in September, 1923, became trustee under the will of Angier B. Duke. The will created two trusts, one for the benefit of Anthony Newton Duke, the other for the benefit of Angier B. Duke, Jr., each a son of the testator. The principal constituting the

trust for Anthony Newton Duke was \$3,844,663.23, and for Angier B. Duke, Jr., was \$3,844,608.23.

On January 2, 1931, the Surrogates' Court of New York County made a decree in a proceeding for the settlement of the trustee's accounts for the period from February 26, 1926 to December 31, 1929, whereby that court authorized [fol. 178] the petitioner to retain and pay to itself out of the corpus of the trust for Anthony Newton Duke \$38,641.71, and out of the corpus of the trust for Angier B. Duke, Jr., \$38,641.06, as compensation for its services. The petitioner paid to itself the sums fixed by the court as commissions on principal. The amounts thus paid were not deducted by it in its income tax return for the taxable year 1931, but it now asks for a determination of overassessment because of such payments from the principal of the respective trusts. Deductions for commissions for receiving and paying out income of the trusts during the taxable year were allowed by the Commissioner and have not since been questioned.

The decedent's will provided that the trustee should hold the corpus of each trust for the designated beneficiary and collect the income thereof and apply the same to the support, education and maintenance of the beneficiary for his life and after his death for the support, education and maintenance of his lineal descendants, payments, applications and distributions during his minority to be under the control and discretion of the trustee. There were various testamentary provisions for disposing of income of the trusts not applied for support, education and maintenance and accumulated during the minority of the testator's sons.

The duties of the petitioner as trustee of the respective trusts consisted generally in causing its investment committee to review several times each year the securities comprising the corpus; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends; paying expenses of the trusts; distributing income to beneficiaries; keeping books of account; rendering statements to the interested parties and preparing and filing income tax returns.

The current diary recording the activities of the trustee in the trust for Anthony Newton Duke showed 18 items in [fol. 179] the year 1931, while in the trust for Angier B. Duke, Jr., it showed 19 items. The investments referred to were all stocks and bonds.

The Revenue Act of 1928, in providing for deductions in computing taxable income, contains the following provisions:

"Sec. 23. Deductions from gross income.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, or property to which the taxpayer has not taken or is not taking title or in which he has no equity."

The pertinent capital transactions in the two trusts during the year 1931 were relatively few. They consisted of sales of securities in the trust for Anthony Newton Duke to furnish sufficient cash to pay the commissions allowed out of principal by the Surrogate, an investment in tax free municipal bonds in place of \$18,000 of similar bonds which were redeemed, a sale of 100 shares of stock of American Cigar Company for \$7,996 and of some warrants on stock of Aluminum Ltd. for \$238.10. Capital transactions in the trust for Angier B. Duke, Jr., were almost identical.

[fol. 180] The Board of Tax Appeals, by a divided vote, sustained the Commissioner in holding that the commissions computed on receipts of and payments from the principal of the trusts were not deductible, for the reason that the trustee was not carrying on a "trade or business". We hold that in caring for the trust estate the trustee was like an individual engaged in investing his funds in stocks and bonds and that such a person cannot be regarded as engaged in business and, therefore, is not entitled to be allowed any deduction for expenses incurred in investing and supervising the estate.

The trusts of which the petitioner was trustee were family trusts of the ordinary type and though the testator gave to the trustee broad powers of investment and reinvestment and authority to retain any of the testator's investments, he

added the caution "to be more careful as to the security of the funds than as to the acquisition of higher rates of interest, my desire being to have my property prudently and securely managed rather than hazarded in what may promise great gains."

In each trust a far greater amount of income was accumulated during the year 1931 than was sufficient to pay the commissions allowed by the Surrogates Court on receipts and payments of principal. Though these commissions amounting to \$38,641.71 in the trust for Anthony Newton Duke and \$38,641.06 in the trust for Angier B. Duke, Jr., were actually paid out of the principal of the respective trusts, the petitioner seeks to have them allowed as deductions from the income accumulated during the year 1931 in determining the net income for that year taxable against the trustee. In spite of the fact that the allowance of such deductions from income would prima facie seem strange in view of the fact that the trustee necessarily paid the commissions from capital, the deduction might be permissible under the statute if the commissions be regarded as [fol. 181] ordinary expenses of one engaged in carrying on business on behalf of those beneficially interested in the trusts. The primary difficulty with allowing the deduction is that a passive recipient of income or a mere investor, either in his own capacity or through an agent, is not regarded as "carrying on any trade or business." *Van Wart v. Commissioner*, 295 U. S. 112; *Higgins v. Commissioner*, decided by Circuit Court of Appeals of the Second Circuit, May 6, 1940; *Kane v. Commissioner*, 100 F. (2d) 382, (C. C. A. 2); *Miller v. Commissioner*, 102 F. (2d) 476, (C. C. A. 9). Whether the activities of a taxpayer are sufficient to place him in the category of one engaged in carrying on a business is largely a matter of degree. *Foss v. Commissioner*, 75 F. (2d) 326, (C. C. A. 1). Undoubtedly the trust company, engaged as it is in administering hundreds of trusts, was carrying on a business and in computing its individual income taxes could properly claim deductions for its ordinary and necessary expenditures. But it is another thing for it to deduct from income which it has accumulated during a certain year its compensation for acting as trustee when its activities have consisted in making investments and in ordinary administration and supervision of the trusts. It was not, and one may fairly say it could not be, dealing in the trust securities like a trader in stocks and bonds. The

natural and legal limitations of a trustee differ fundamentally from those of an active speculator and do not place such a fiduciary in the category of one carrying on a business. *Raffing v. Burnet*, 47 F. (2d) 859, (C. C. A. 8).

The case of a ward who, under the decision in *Van Wart v. Commissioner*, 295 U. S. 112, is precluded from deducting legal fees paid by his guardian to recover income due his estate seems hard to distinguish from that of the petitioner in the case at bar. Neither, we think, falls within the provisions of Sec. 23 (a) because ward, guardian and trustee [fol. 182] will under ordinary circumstances fail to establish that he is carrying on a trade or business.

The chief argument against treating the petitioner like a custodian, guardian or individual investor is that by administrative practice trustees have generally been treated by the taxing authorities as carrying on a business, however limited their activities may in fact have been. But the departmental rulings relied upon by the taxpayer were not promulgated by the Secretary of the Treasury and, therefore, are of little aid in interpreting the statute. *Biddle v. Commissioner*, 302 U. S. 573, 582. Accordingly we are confronted with a situation where there has been no decision by the Supreme Court or by a Circuit Court of Appeals in regard to the status of a trustee who has been confined in his activities to investing the trust property, administering it in the customary manner and supervising the estate. In spite of the practice of the tax department to treat such a trustee as though engaged in business we see no rational ground for distinguishing his position from that of a guardian, custodian or individual investor, and are therefore impelled to disallow the deductions prayed for, as did the Commissioner and the Board of Tax Appeals.

Orders affirmed.

[fol. 183] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of June, one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand,
Hon. Harrie B. Chase, Circuit Judges.

No. 158

CITY BANK FARMERS TRUST Co., as Trustee, etc., Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent
Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 184] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. City Bank Farmers Trust Co., as Trustee, etc., v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 12, 1940. D. E. Roberts, Clerk.

[fol. 185] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of June, one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

No. 159

CITY BANK FARMERS TRUST Co., as Trustee, etc., Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent
Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 186] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. City Bank Farmers Trust Co., as Trustee, etc., v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 12, 1940. D. E. Roberts, Clerk.

[fol. 187] UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 186, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cases of City Bank Farmers Trust Company, as Trustee of a Trust under the Last Will and Testament of Angier B. Duke, Deceased, for the Benefit of Anthony Newton Duke, v. Commissioner of Internal Revenue; City Bank Farmers Trust Company, as Trustee of a Trust under the last Will and Testament of Angier B. Duke, Deceased, for the Benefit of Angier B. Duke, Jr., v. Commissioner of Internal Revenue, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this third day of September, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

D. E. Roberts, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

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[fol. 188] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1940

No. 408

ORDER ALLOWING CERTIORARI—Filed February 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 189] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1940

No. 409

ORDER ALLOWING CERTIORARI—Filed February 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

Office - Supreme Court, U. S.

FILED

SEP 9 1940

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 408 - 409

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of
Angier B. Duke, Deceased, for the Benefit of
ANTHONY NEWTON DUKE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of
Angier B. Duke, Deceased, for the Benefit of
ANGIER B. DUKE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writs of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit.

ROLLIN BROWNE,
20 Exchange Place,
New York, N. Y.,
Attorney for Petitioners.

JOHN G. JACKSON, JR.,
GEORGE CRAVEN,
MITCHELL, TAYLOR, CAPRON & MARSH,
JACKSON, FULLER, NASH & BROPHY,
New York, N. Y.,
Of Counsel.

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OTHER AUTHORITIES CITED:

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

Nos.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of
Angier B. Duke, Deceased, for the Benefit of
ANTHONY NEWTON DUKE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,
and

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of
Angier B. Duke, Deceased, for the Benefit of
ANGIER B. DUKE, JR.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**Petition for Writs of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit.**

The petitioners pray that writs of certiorari issue
to review the judgments (R. 183, 185) of the United
States Circuit Court of Appeals for the Second Cir-
cuit entered in these cases on June 12, 1940.

Summary Statement of Matter Involved.

In these cases there is presented to this Court for the first time the question of whether trustees' commissions are deductible as ordinary and necessary business expenses in computing net taxable income of the trust estates.

The Board of Tax Appeals and the Court of Appeals held that such commissions were not deductible because the administration of the trusts did not constitute "business" within the meaning of the income tax laws (R. 176). The Court of Appeals expressly based its decision on its earlier decision in *Higgins v. Commissioner*, 111 F. (2d) 795, now pending before this Court (No. 253) on a petition for a writ of certiorari. The petition for certiorari in the *Higgins* case is unopposed by the Department of Justice, which concedes that such decision conflicts with the decision of the Third Circuit in *Dupont v. Deputy*, 103 F. (2d) 257 and "probably cannot be reconciled with the decision of the Sixth Circuit in *Kales v. Commissioner*, 101 F. (2d) 35".

Opinions Below.

The majority opinion (R. 36), the concurring opinion (R. 42) and the dissenting opinion (R. 43) of the United States Board of Tax Appeals are reported in 39 B. T. A. 29. The opinion of the Circuit Court of Appeals (R. 176) is reported in 112 F. (2d) 457.

Jurisdiction.

Jurisdiction to issue the writs prayed for is vested in this Court by Section 240(a) of the Judicial Code,

as amended by the Act of February 13, 1925. The judgments of the Circuit Court of Appeals were entered on June 12, 1940 (R. 183, 185).

Questions Presented.

1. Are the necessary and reasonable expenses of the administration of a trust for the investment and reinvestment of a fund of several million dollars and the accumulation and reinvestment of the income therefrom, including customary commissions of the trustee, computed in accordance with State law, deductible in computing the net taxable income of the trust estate, as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business"?

2. Has the repeated reenactment of the section of the revenue law providing for the deduction of ordinary and necessary business expenses established Congressional approval of the uniform and consistent administrative practice under which the deduction of trustees' commissions as business expenses always has been allowed?

Statute Involved.

There are involved the following provisions of the Revenue Act of 1928:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a

reasonable allowance for salaries or other compensation for personal services actually rendered;

* * * "

Facts.

The trusts were established under the will of Angier B. Duke, a New York decedent, one for the benefit of each of his sons (R. 65). The trustee of each trust was authorized to apply income for the support and education of a son and was directed to accumulate all income not so used, until the son reached his majority, whereupon the accumulations of income were to be paid over to him, the principal to be continued in trust for the benefit of himself and his descendants (R. 75-77).

The trusts were set up on February 26, 1926 by transfer from the executor of securities of the market value of over \$3,800,000 in the case of each trust (R. 71, 84, 86).

During the tax year (1931) the trust assets comprised a diversified list of securities aggregating over \$7,600,000 of principal, plus nearly \$2,000,000 of accumulated income, a total of nearly \$10,000,000. A complete list of investments was not introduced at the trial, but the trustee's ledger sheets reflecting the transactions during the tax year disclose that the funds were invested in at least sixty-five different bond issues aggregating \$3,500,000 face amount and at least eighteen different stocks aggregating 85,000 shares, a total of eighty-three different income-producing securities (R. 125-156).

The trustee was given wide discretionary investment powers and was not restricted to so-called legal trust fund investments prescribed by the New York statutes (R. 89-90). The trustee was authorized to

retain the investments received from the testator and was admonished that the property should be managed prudently and securely, "rather than hazarded in what may promise great gains" (R. 78).

The combined trust income of both trusts in 1931 amounted to over \$250,000, of which, after deducting distributions made for the support of the beneficiaries, over \$230,000 was accumulated for their benefit (R. 67, 68). The figures as to 1930 do not appear in the record, but up to the end of 1929, the trust income aggregated over \$1,900,000, of which over \$1,700,000 was accumulated and invested (R. 85, 87).

During 1931 the trustee made at least 47 security transactions, including 22 purchases, 19 sales and 6 redemptions (R. 125-156). The transactions during the earlier years do not appear in the record.

The Board stated in its opinion (R. 40) that the trustee's accounting showed only nominal expenses aside from taxes. The Board overlooked those expenses which were charged against principal under the New York law and which aggregated over \$25,000 (R. 84, 86) and ignored the trustee's commissions amounting to over \$76,000 computed on principal and over \$21,000 computed on income (R. 85, 87), which covered all the ordinary expenses, as well as the compensation, of the trustee.

The Board found (R. 36):

"The duties of the petitioner as trustee of the trusts consisted in general of causing its investment committee to review several times each year the securities comprising the corpus of the trust; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends on securities; paying expenses of the

trusts; distributing income to beneficiaries; keeping the books of account of the trusts; rendering statements to the interested parties; and preparing and filing income tax returns."

The Trust Officer in charge of the account testified that the investments held in these trusts were reviewed at least 2 to 4 times a year by an investment committee, in addition to weekly or monthly reviews by the investment clerk and the senior officer in charge (R. 107). In 1930 the trustee filed an intermediate accounting for the purpose of securing the Surrogate's instructions as to its investment powers and duties (R. 112).

Under Section 285 of the New York Surrogate's Court Act, a trustee is entitled to receive "for his services in such official capacity" commissions as follows: "for receiving and paying out all sums of money not exceeding \$2,000 at the rate of five per centum", and "for receiving and paying out any additional sums at lower graduated rates. Commissions computed on the amount of income received and paid out may under certain conditions be deducted from the income and paid to itself by the trustee. Commissions computed on the amount of principal received and paid out are allowable only on judicial settlement of the trustee's accounts.

Pursuant to the authority of that statute, the trustee has withheld from the trust income and paid to itself commissions computed on the trust income. In the tax returns which it has filed for the trusts such commissions have been claimed as deductions in computing the net income of the trust, and such deductions have uniformly been allowed by the Commissioner of Internal Revenue without question (R. 103, 111).

No commissions computed on the principal of the trusts were claimed by the trustee or allowed or paid to it until 1931, when its first judicial accounting was approved by the Surrogates' Court of New York County (R. 66, 87, 88). In that accounting the trustee was allowed commissions computed on principal amounting to \$38,641.71 in the Anthony N. Duke Trust and \$38,641.06 in the Angier B. Duke, Jr., Trust, which it duly paid to itself and charged to the principal of the trusts as required by the decree (R. 66, 67).

Rulings Below.

At the trial of the cases before the Board, counsel for the Commissioner in effect conceded that the administration of the trusts constituted business; he stated that the Commissioner had allowed the deduction of the trustee's ordinary income commissions and all other ordinary and necessary business expenses (R. 103). He urged, however, that the commissions on principal should not be allowed because they were not proper income charges, but represented large, unusual items of a capital nature (R. 103-4).

Nevertheless, in the brief which he filed after the trial of the cases, counsel for the Commissioner urged that the administration of the trusts was not a business and that the commissions in dispute should be disallowed on that ground, as well as on the ground stated at the trial.

The Board of Tax Appeals sustained the Commissioner. Seven members of the Board concurred in an opinion disallowing the commissions solely on the ground that the trustee's administration of the trusts was not a business (R. 36). Four members, in a separate opinion, concurred in that holding but also

justified the disallowance of the commissions on the ground that they were "non-recurring items chargeable to and deductible from corpus" (R. 42). Five members dissented (R. 42, 43).

The Court of Appeals affirmed, saying:

"We hold that in caring for the trust estate the trustee was like an individual engaged in investing his funds in stocks and bonds and that such a person cannot be regarded as engaged in business and, therefore, is not entitled to be allowed any deduction for expenses incurred in investing and supervising the estate" (R. 180).

"In spite of the practice of the tax department to treat such a trustee as though engaged in business we see no rational ground for distinguishing his position from that of a guardian, custodian or individual investor * * *" (R. 182).

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the administration of the trusts was not the conduct of business within the meaning of Section 23(a) of the Revenue Act of 1928.

2. In upholding the Commissioner's contention that the administration of the trusts was not the conduct of business, despite the Commissioner's concession to the contrary at the trial.

3. In holding that the trustee's commissions in question were not "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business", within the meaning of said section.

4. In ignoring the long established and consistent administrative practice under which such commissions have been allowed as business expenses, and in failing to consider such practice controlling on the interpretation of the statute.

5. In approving the Commissioner's disallowance of the commissions in question and in affirming the decisions of the Board of Tax Appeals disallowing the claimed deductions.

Reasons for Granting the Writ.

1. These cases present merely a particular aspect of the general question involved in *Higgins v. Commissioner*, 111 F. (2d) 795.

The general question presented in the *Higgins* case is whether ordinary and necessary expenses incurred in the management and conservation of income-producing properties and the production of income therefrom are deductible as business expenses in computing net taxable income.

These cases involve two trusts for the investment and reinvestment of capital funds of several million dollars each and the accumulation and reinvestment of the income therefrom, and the question is whether the ordinary and necessary expenses of the administration of such trusts, including the trustee's commissions, are deductible as business expenses.

The Court of Appeals rested its decision in these cases on its decision in the *Higgins* case, in which it had held that the management and conservation of investments, as distinguished from active trading or speculation, does not constitute "business". In its

decision in the *Higgins* case, the Court of Appeals stated that its views could not be reconciled with the decision of the Sixth Circuit in *Kales v. Commissioner*, 101 F. (2d) 35.

As stated above, a petition for a writ of certiorari has been filed in this Court in the *Higgins* case (No. 253). The Department of Justice has filed a short memorandum stating that "the respondent does not oppose the granting of a writ of certiorari in this case." It is conceded that the decision in the *Higgins* case "is contrary to the holding of the Circuit Court of Appeals in the *Dupont* case (*Dupont v. Deputy*, 103 F. (2d) 257) and probably cannot be reconciled with the decision in the *Kales* case."

In view of the square conflict created by the decision, there is the probability that a writ of certiorari will be granted in the *Higgins* case. If so, it is respectfully submitted that writs should be issued also in these cases so that the petitioners may have an opportunity to be heard in this Court at the same time.

2. In its decision in the *Kales* case, the Sixth Circuit approved and relied upon the uniform and long continued administrative practice under which ordinary and necessary expenses incurred in the management and conservation of income-producing properties and the production of income therefrom always have been allowed as business expenses. The Second Circuit, in its decision in the *Higgins* case, ignored the administrative practice, possibly because it was not called to its attention in that case. In the instant cases, the Second Circuit referred to such administrative practice, under which trustees' commissions have uniformly been allowed as business expenses,

but refused to follow such practice solely on the ground that "the departmental rulings relied upon by the taxpayer were not promulgated by the Secretary of the Treasury and, therefore, are of little aid in interpreting the statute."

In this respect, the decision of the Court of Appeals conflicts with the decisions of this Court in *Helvering v. Bliss*, 293 U. S. 144, 151, and *McFeely v. Commissioner*, 296 U. S. 102, 108, in both of which departmental rulings not promulgated by the Secretary of the Treasury were accepted by this Court as sufficiently establishing administrative practice.

3. The precise question presented in these cases, as to whether the administration of a trust for investment and reinvestment and the accumulation and reinvestment of income constitutes a business, so that the ordinary and necessary expenses of administering the trust are deductible in computing its net income, is an important question of federal law which has never been, but should be, decided by this Court.

Even after the decisions below in these cases, the Commissioner, we understand, has continued his practice of allowing trustees to deduct *as business expenses* all expenses which he considers to be "ordinary and necessary" to the production of taxable income, but whenever a trustee claims a deduction for any item which the Commissioner does not consider an "ordinary and necessary" expense, the Commissioner invokes the decision in these cases to justify the disallowance of *all claimed business expenses*.

It is submitted that this is an intolerable situation which necessarily leads to utter confusion. A final and definite decision by this Court as to whether or not the administration of trusts constitutes the conduct of business is essential.

If this Court reviews these cases and holds that the petitioners are entitled to deduct their ordinary and necessary business expenses, it then will be necessary for this Court to determine whether the commissions in question, which, in accordance with New York law, were computed on the basis of and paid out of the corpus of the trusts, were ordinary and necessary business expenses.

This is not the time to argue that question. We think there is no answer to the petitioners' contention that such commissions are deductible. That there is at least substantial merit to the contention is shown by the facts that (1) of the nine members of the Board of Tax Appeals who considered the question, five were of the opinion that the commissions were deductible, (2) the Court of Appeals said that the deduction of such commissions "might be permissible", and (3) the Commissioner of Internal Revenue has ruled expressly that such commissions are deductible (S. M. 2463, III-2 Cum. Bull. 91; S. O. 88, 4 Cum. Bull. 119).

For the foregoing reasons, the petitioners respectfully pray that writs of certiorari issue to review the decisions below.

Respectfully submitted,

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Attorney for Petitioners.

JOHN G. JACKSON, JR.,
GEORGE CRAVEN,
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JACKSON, FULLER, NASH & BROPHY,
Of Counsel.

September 6, 1940.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 408, 409.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of Angier B. Duke,
Deceased, for the Benefit of ANTHONY NEWTON DUKE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
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Deceased, for the Benefit of ANGIER B. DUKE, JR.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

**SUPPLEMENTAL MEMORANDUM FOR THE
PETITIONERS.**

✓
ROLLIN BROWNE,
Attorney for Petitioners.

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ON PETITION FOR WRITS OF CERTIORARI TO THE
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**SUPPLEMENTAL MEMORANDUM FOR THE
PETITIONERS.**

The Solicitor General, consistently with the position he took in not opposing the petition for certiorari in *Higgins v. Commissioner*, 111 F. (2d) 795 (No. 253, October Term, 1940, certiorari granted October 14, 1940), is not opposing the issuance of writs in these cases.

Higgins v. Commissioner presents the question whether personal investment activities of an individual constitute the conduct of business within the meaning of Section 23(a) of the income tax laws, which allows the deduction of business expenses in computing net income.

These cases involve a particular aspect of the same question; viz., whether the administration of a trust fund invested in securities, and the accumulation and reinvestment of the income therefrom, constitute a business.

Since the petition herein was filed, the United States Court of Claims has passed on the specific question involved in these cases and has held, contrary to the decision of the Second Circuit herein, that the administration of a trust fund of investments does constitute a business within the meaning of the statute. *Pyne et al., Executors v. United States*, decided October 7, 1940, as yet unreported.

The decision of the Court of Claims in the *Pyne* case is in direct conflict with the decision below in these cases and furnishes an additional reason for granting certiorari herein.

For the convenience of the Court, a copy of the opinion of the Court of Claims is appended hereto.

Respectfully submitted,

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Attorney for Petitioners.

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Of Counsel.

October 18, 1940

Appendix.**IN THE COURT OF CLAIMS OF THE
UNITED STATES**

No. 44007

(Decided October 7, 1940)

**HERBERT RIVINGTON PYNE ET AL., EXECUTORS OF THE
ESTATE OF PERCY R. PYNE, v. THE UNITED STATES**

WHITAKER, *Judge*, delivered the opinion of the court:

This case involves the right of the estate of Percy R. Pyne, deceased, in computing its income tax, to deduct attorney's fees and attorney's expenses from the gross income of the estate. *

Supplement E of Title I of the Revenue Act of 1934 (48 Stat. 680, 727) provides for the taxation of the income of estates and trusts. Section 161 (a) under that supplement provides:

The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, * * *

and Section 162 provides:

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, * * *

with certain exceptions not material here. Section 23 specifies the deductions from gross income allowable

to an individual and, therefore, to an estate. Subsection (a) permits the deduction of—

* * * All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

Attorney's fees are, of course, ordinary and necessary expenses in carrying on a trade or business, and these attorney's fees are, therefore, deductible if the estate was engaged in carrying on a trade or business, and the attorney's fees were incurred in doing so.

The word "business," in the sense the word is used in the Revenue Act, is defined by Webster as—

That which busies, or engages time, attention, or labor, as a principal serious concern or interest. Specif. *a*—Constant employment; regular occupation; work; * * * *b* any particular occupation or employment habitually engaged in, esp. for livelihood or gain.

And the Supreme Court in one of the early tax decisions under the Corporation Excise Tax Law of 1909 defined business as "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit (Bouvier's Law Dictionary, Vol. 1, p. 273)." *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171. Equally is it true that whatever engages the time, attention, and labor of men in order to conserve what they have or to avoid loss is likewise a business.

In *Deputy, Administratrix, et al. v. du Pont*, 308 U. S. 488, 492, certain expenses had been incurred by

the respondent which he sought to deduct as ordinary and necessary expenses paid in carrying on his trade or business, which in that case he insisted was that of preserving his investment in the E. I. du Pont de Nemours and Company. The majority opinion stated:

The District Court concluded, on the basis of respondent's large and diversified investment holdings and his wide financial and business interests, that his business was primarily that of conserving and enhancing his estate. The petitioners challenge that conclusion, asserting that respondent's activities in connection with conserving and enhancing his estate did not constitute a "trade or business" within the meaning of sec. 23 (a) of the Act.

But as we view the case it is unnecessary for us to pass on that contention and to make the delicate dissection of administrative practice which that would entail. * * *

In a concurring opinion Mr. Justice Frankfurter, with whom Mr. Justice Reed concurred, pointed out that the decision of the majority of the court was based on the hypothesis that "this taxpayer's activities, for which expenses were sought to be deducted, did constitute a 'trade or business.'" And Mr. Justice Roberts, with whom Mr. Justice McReynolds concurred, in a dissenting opinion expressed the view that the taxpayer's activities did constitute a trade or business and that the expenditures therein were deductible as ordinary and necessary in the carrying on of it. (See the opinion of the majority and Judge Maris' concurring opinion in *du Pont v. Deputy, et al.*, 103 F. (2d) 257.)

In the case of *Kales v. Commissioner of Internal Revenue*, 101 F. (2d) 35, there is an extensive discussion of when an investor, who has no other business, is or is not to be said to be engaged in the investment business. Toward the conclusion of this discussion the court quotes with approval a letter from the Bureau of Internal Revenue to the Committee of Banking Institutions on Taxation in which the Bureau said:

* * * You are advised that the Bureau has recently adopted the policy of allowing as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection and handling of properties producing taxable income.

We think this is sound policy. As the court in that case pointed out, this policy is in accord with decisions of some of the Circuit Courts of Appeal and also of the Board of Tax Appeals.

Percy R. Pyne died in 1929 leaving an estate of some thirty-five million dollars. After making certain specific bequests, he left the residue of his estate in trust to his sons and daughter as trustees, who were also his executors. The estate was not fully administered until 1935. The attorney's fees in question were paid in 1934. They amount to \$40,000, and the attorney's expenses amount to \$155.60. In that year the estate had a gross income of \$154,966.23.

The executors were given power in the administration of the estate to an extent almost equal to that the decedent had during his lifetime. They were given authority to retain the deceased's investments or to sell any part of them and to invest and reinvest the proceeds in any sort of property which appeared to

them advisable, whether or not of the class authorized by the laws of the State of New York or the State of New Jersey. They were authorized to participate in the reorganization of any corporations in which the decedent might hold stocks or securities, or in which any part of the decedent's estate might later be invested, and in such connection to take any action which they might see fit to take.

The decedent died shortly before the stock market crash of 1929 and the subsequent depression. At the time of his death he had over 160,000 shares of stock in 129 different companies, and he held 118 different issues of bonds of a total par value of over \$5,000,000. In order to look after the affairs of the estate the executors maintained an office and employed a manager and six or seven other employees. A very large part of decedent's estate was invested in the stock of the National City Bank, which at the time of his death was selling at \$440.00 a share, but which by 1934 had declined in value to fifteen or twenty dollars a share. The value of these and other investments of the estate so greatly declined before the estate was fully administered that, his attorney testified, "it looked like the estate was almost going to be wiped out."

The Woodward Iron Company, in which the estate had an investment of about two million dollars, went into the hands of a receiver. The executors and their attorney busied themselves to save from the wreck what they could by the organization of a committee of bondholders and stockholders for the purpose of taking over the property.

During 1934 the executors sold their holdings in some 200 companies.

It is difficult to imagine a situation that would have more completely engaged the time and attention of the executors. This is especially so since they were people of limited business experience. They were the three sons and the daughter of deceased. The daughter had had no business experience. One of the sons was a professor of chemistry at Columbia University. Another one had been an embryo archaeologist and had also been in the army. Only one of them had had any practical business experience and his had not been of a sort to enable him to cope with the herculean task of conserving this \$35,000,000 estate in these cataclysmic times.

The attorney's services consisted chiefly in advising the executors on steps to be taken which would best conserve the estate, as to what investments to dispose of, and in what other property to invest the proceeds, in advising the management of the corporations in which the estate had investments as to the steps to be taken to conserve their property and escape loss. In doing so, certainly this attorney was engaged in business, and we have no doubt the executors were likewise engaged in business, in the business of conserving the estate and protecting its income.

The Commissioner has found that all but \$2,000 of the \$40,000 paid the attorney was paid for such services. We are not disposed to disturb this finding. It results that the plaintiffs are entitled to deduct the sum of \$38,155.60. This results in an overpayment of tax in the sum of \$16,542.80, for which the plaintiffs are entitled to judgment, with interest as provided by law. It is so ordered.

LITTLETON, *Judge*; GREEN, *Judge*; and WHALEY, *Chief Justice*, concur.

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v.

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Respondent.

BRIEF FOR PETITIONERS.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940.
Nos. 408, 409.

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of
Angier B. Duke, Deceased, for the Benefit of
ANTHONY NEWTON DUKE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

and

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
Trust Under the Last Will and Testament of
Angier B. Duke, Deceased, for the Benefit of
ANGIER B. DUKE, JR.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The majority opinion (R. 36), the concurring opinion (R. 42) and the dissenting opinion (R. 43) of the United States Board of Tax Appeals are reported in 39 B. T. A. 29. The opinion of the Circuit Court of Appeals (R. 176) is reported in 112 F. (2d) 457.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgments of the Circuit Court of Appeals were entered on June 12, 1940 (R. 181-182). The petition for certiorari was filed September 9, 1940, and granted February 10, 1941.

Questions Presented.

(1) Are the customary commissions of a testamentary trustee, computed in accordance with State law, deductible in computing the net taxable income of the trust estate, as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business"?

(2) Is it a valid objection to the allowance of such trustee's commissions as "ordinary and necessary expenses" that they were computed on the basis of and paid out of the corpus of the trust?

The Statute.

There are involved the following provisions of the Revenue Act of 1928:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *"

"SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

- (1) Personal, living, or family expenses;
- (2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;
- (3) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; * * *."

The cases involve also a consideration of Section 285 of the Surrogate's Court Act of New York, which prescribes the method of computing and paying trustees' commissions and which for the convenience of the Court is set forth in an appendix to this brief.

The Facts.

The trusts were established under the will of Angier B. Duke, a New York decedent, one for the benefit of each of his two sons (R. 65). The trustee of each trust (the petitioner) was authorized to apply income for the support and education of a son and was directed to accumulate all income not so used until the son reached his majority, whereupon the accumulations of income were to be paid over to him, the principal to be continued in trust for the benefit of the son and his descendants (R. 75-77).

The trusts were set up on February 26, 1926, by transfer from the executor of securities of the market

4

value of over \$3,800,000 in the case of each trust (R. 71, 84, 86).

During the tax year (1931) the combined trust assets comprised a diversified list of securities aggregating over \$7,600,000 of principal, plus nearly \$2,000,000 of accumulated income, a total of nearly \$10,000,000. A complete list of investments was not introduced at the trial, but the trustee's ledger sheets reflecting the transactions during the tax year disclose that the funds were invested in at least sixty-five different bond issues aggregating \$3,500,000 face amount and at least eighteen different stocks aggregating 85,000 shares, a total of eighty-three different income-producing securities (R. 125-156).

The trustee was given wide discretionary investment powers and was not restricted to so-called legal trust fund investments prescribed by the New York statutes (R. 89-90). The trustee was authorized to retain the investments received from the testator and was admonished that the property should be managed prudently and securely, "rather than hazarded in what may promise great gains" (R. 78). In a decree construing the will, the Surrogate instructed the trustee that it was its duty to "at all times exercise keen and alert judgment with respect to" the investment and reinvestment of the trust funds (R. 90).

The combined trust income of both trusts in 1931 amounted to over \$250,000, of which, after deducting distributions made for the support of the beneficiaries, over \$230,000 was accumulated for their benefit (R. 67, 68). The figures for 1930 do not appear in the record, but up to the end of 1929 the trust income aggregated over \$1,900,000, of which over \$1,700,000 was accumulated and invested (R. 85, 87).

During 1931 the trustee made at least 47 security

transactions, including 22 purchases, 19 sales and 6 redemptions (R. 125-156). The transactions during the earlier years do not appear in the record.

The Board found (R. 36):

"The duties of the petitioner as trustee of the trusts consisted in general of causing its investment committee to review several times each year the securities comprising the corpus of the trust; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends on securities; paying expenses of the trusts; distributing income to beneficiaries; keeping the books of account of the trusts; rendering statements to the interested parties; and preparing and filing income tax returns."

The Trust Officer in charge of the account testified that the investments held in these trusts were reviewed at least 2 to 4 times a year by an investment committee, in addition to weekly or monthly reviews by the investment clerk and the senior officer in charge (R. 107). In 1930 the trustee filed an intermediate accounting for the purpose of securing the Surrogate's instructions as to its investment powers and duties (R. 112).

Under Section 285 of the New York Surrogate's Court Act, printed in the Appendix, a trustee is entitled to receive "for his services in such official capacity" commissions as follows: "for receiving and paying out all sums of money not exceeding \$2,000 at the rate of five per centum", and "for receiving and paying out any additional sums" at lower graduated rates. Commissions computed on the amount of income received and paid out may under certain

conditions be deducted from the income and paid to itself by the trustee. Commissions computed on the amount of principal received and paid out are allowable only on judicial settlement of the trustee's accounts.

Pursuant to the authority of that statute, the trustee has withheld from the trust income and paid to itself commissions computed on the trust income. In the tax returns which it has filed for the trusts such commissions have been claimed as deductions in computing the net income of the trust, and such deductions have uniformly been allowed by the Commissioner of Internal Revenue without question (R. 103, 111).

No commissions computed on the principal of the trusts were claimed by the trustee or allowed or paid to it until 1931, when its first judicial accounting was approved by the Surrogate's Court of New York County (R. 66, 87, 88). In that accounting the trustee was allowed commissions computed on principal amounting to \$38,641.71 in the Anthony N. Duke Trust and \$38,641.06 in the Angier B. Duke, Jr., Trust, which commissions it paid to itself and charged to the principal of the trusts as required by the decree (R. 66, 67).

The trustee did not claim deductions for the commissions computed on and paid out of principal, on the income tax returns which it filed for the trusts for 1931. However, deductions for such commissions were claimed in the trustee's petitions to the Board of Tax Appeals from the Commissioner's determinations of deficiencies in the 1931 tax (R. 8, 19).

At the trial of the cases before the Board, counsel for the respondent conceded that the trustee's ordinary income commissions (and all other ordinary and necessary business expenses of the trust) were allow-

able (R. 103). He urged that the commissions in issue should not be allowed because they were not proper income charges, but represented large, unusual items of a capital nature which were computed on the basis of and paid out of the corpus of the trusts, and he stated that, therefore, previous rulings by the Treasury and the Board allowing deductions for trustees' commissions as business expenses were distinguishable (R. 103, 104).

Despite the concession which he had made at the trial, counsel for the respondent urged, in the brief which he filed after the trial, that the administration of the trusts did not constitute a business, and that the trustee was not entitled to deduct any business expenses, and that the commissions in issue should be disallowed on that ground as well as on the ground relied on at the trial.

Rulings Below.

The Board of Tax Appeals sustained the Commissioner. Seven members of the Board concurred in an opinion disallowing the commissions solely on the ground that the trustee's administration of the trusts was not a business (R. 36). Four members, in a separate opinion, concurred in that holding but also justified the disallowance of the commissions on the ground that they were "non-recurring items chargeable to and deductible from corpus" (R. 42). Five members dissented (R. 42, 43).

The Court of Appeals affirmed, saying:

"We hold that in caring for the trust estate the trustee was like an individual engaged in investing his funds in stocks and bonds and that

such a person cannot be regarded as engaged in business and, therefore, is not entitled to be allowed any deduction for expenses incurred in investing and supervising the estate" (R. 178).

"In spite of the practice of the tax department to treat such a trustee as though engaged in business we see no rational ground for distinguishing his position from that of a guardian, custodian, or individual investor * * *" (R. 180).

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the administration of the trusts was not the conduct of business within the meaning of Section 23(a) of the Revenue Act of 1928.

2. In upholding the Commissioner's contention that the administration of the trusts was not the conduct of business, despite the Commissioner's concession to the contrary at the trial.

3. In holding that the trustee's commissions in question were not "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business", within the meaning of said section.

4. In ignoring the long-established and consistent administrative practice under which such commissions have been allowed as business expenses, and in failing to consider such practice controlling on the interpretation of the statute.

5. In approving the Commissioner's disallowance

of the commissions in question and in affirming the decisions of the Board of Tax Appeals disallowing the claimed deductions.

Summary of Argument.

The respondent's concession at the trial, that certain items were deductible as business expenses in computing the net income of the trusts, constituted an admission that the administration of the trusts was a business. This concession removed that issue from the case. The respondent should not have been permitted, after the trial, to repudiate his concession and re-inject that issue into the case.

"Ordinary and necessary" trustees' commissions have always been allowed as "business" expenses, under a settled and uniform administrative practice which has been followed, without substantial deviation or challenge in the Board or the courts, from the inception of the income-tax laws until after the trial of these cases in the Board. While this administrative practice has been in effect, the statutory provision allowing deductions for ordinary and necessary business expenses has been reenacted twelve times. These repeated reenactments of the provision indicate Congressional approval of the administrative practice and have given to it the force and effect of law.

The administrative practice is sound, and should be approved. The decision in *Higgins v. Commissioner*, decided February 3, 1941 (No. 253), involving personal investment activities of an individual, is distinguishable. Here, the trusts were separate legal and taxable entities, and the trustee was administering the trust estates for the benefit of others. There-

- fore, the commissions of the trustee and the other expenses of administering the trusts cannot possibly be regarded as "personal" expenses.

The trusts were established for the investment and reinvestment of a large sum and accumulating and reinvesting the income therefrom, thus building up an ever increasing fund. Investment activities of that nature, when carried on by a corporation or a trust, have often been held to constitute the conduct of business.

The disallowance of trustees' commissions as "business" expenses would produce difficult complications, and would result in only a slight increase in the public revenues.

The commissions here in issue should not be disallowed merely because they were computed on the basis of and paid out of principal of the trust funds. Such commissions were paid for the trustee's care and management of the trusts, and not for the mere act of receiving the principal. They differ in no respect from the commissions paid on income, which the respondent conceded are allowable deductions. An item otherwise deductible in computing net income taxable to a trust as an entity may not be disallowed just because it is charged against principal instead of income of the trust.

Argument.

I.

The respondent is bound by his concession at the trial that the ordinary and necessary expenses of the trust, including the trustee's commissions on income, are allowable deductions.

The commissions in issue, which were computed on and paid out of the trust corpus, were claimed as deductions in the trustee's petitions to the Board. The respondent's answers to the petitions pleaded general denial and thus raised the broad, general question of whether the commissions in issue were (1) ordinary and necessary expenses, (2) incurred in business.

The question of whether the commissions were "business" expenses was, therefore, within the issues framed by the pleadings, as well as the question of whether the commissions were "ordinary and necessary" expenses.

However, at the trial, the respondent's counsel, in his opening statement, conceded on the record that the trustee was entitled to deductions for business expenses, such as the usual commissions computed on and paid out of trust income, and he said that all such expenses had been allowed by the Commissioner. He then added that the respondent contended that the commissions in issue were not allowable because they were large, unusual items paid for the trustee's act of receiving the trust corpus in 1926, were not connected with the production of trust income but were paid out of the corpus of the trusts and that, therefore, the previous rulings by the Treasury and the Board allowing deductions for trustees' commissions as business expenses were distinguishable (R. 103-104).

By this concession on the record, the issue in the cases was narrowed and precisely defined, and any question as to whether the administration of the trust constituted a business within the meaning of Section 23(a) was abandoned by the respondent and thus removed from the cases.

In *Helvering v. Wood*, 309 U. S. 344, this Court held that the Commissioner could not on appeal abandon a concession made at the trial *on a pure question of law*, and "shift to ground which the taxpayer had every reason to think was abandoned", even though the facts were not in dispute and although this Court said that, but for the concession, it would have upheld the contention which the Commissioner later sought to urge in disregard of his concession.

It is true that, in the *Wood* case, the Commissioner did not attempt to repudiate his concession until the case was on appeal, whereas here he attempted to repudiate it in his brief in the Board. However, issues must be raised before or at the trial of a case, not after the trial. The decision in the *Wood* case is fully applicable to the situation presented here. *General Utilities & Operating Co. v. Helvering*, 296 U. S. 200.

LeTulle v. Scofield, 308 U. S. 415, and *Helvering v. Gowran*, 302 U. S. 238, are not in point. In the *LeTulle* case, the issue on which the case was decided in the Supreme Court had been properly raised and insisted on in the Board. In the *Gowran* case, this Court pointed out that the appellant in the Court of Appeals had not objected to that court's consideration of the new issue which the appellee raised there for the first time.

The petitioner was entitled to know at or before the trial the issues upon which the cases would be

submitted to the Board, and, therefore, the respondent should not be permitted to repudiate after the trial the concession which his counsel made on the record at the trial.

II.

The settled administrative practice, pursuant to which trustees' commissions have uniformly been allowed as business expenses, has been approved by Congress through repeated reenactment of the statute.

The Court of Appeals conceded that the administrative practice has been to allow trustees' commissions as "business" expenses, but refused to give effect to the practice solely for the reason that it has never been set forth in a Regulation or Treasury decision issued by the Secretary of the Treasury.

The holding of the Court of Appeals on that point was clearly erroneous.

A Regulation or Treasury Decision may be the best evidence of a uniform and consistent administrative practice, since it will be presumed that the instructions of the Secretary as set forth therein have been obeyed consistently by all subordinates of the Department in their adjustment of the cases handled by them. But it does not follow that administrative practice cannot be proved otherwise than by Regulations or Treasury Decisions. Where departmental rulings have applied the same principle uniformly and consistently in case after case over a long period of time and where such rulings are not in conflict with any general Regulation or Treasury Decision, they are adequate proof of the administrative practice, and have been accepted as such by this Court. *Helvering v. Bliss*, 293 U. S. 144, 151; *McFeely v. Commissioner*, 296 U. S. 102, 108.

In *Higgins v. Commissioner, supra*, this Court again recognized that rulings of the Bureau of Internal Revenue, not issued by the Secretary of the Treasury, may constitute sufficient evidence of a settled administrative practice. The Court, in holding that the rulings in that particular case did not establish "a fixed administrative construction" of the statute, pointed out that the Commissioner had advanced contentions contrary to such rulings in a number of cases in the Board and the courts. The Court said:

"Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge by the Government in the Board and courts, it should not be assumed, from rulings of this class, that Congressional reenactment of the language which they construed was an adoption of their interpretation."

The administrative practice on the allowance of trustees' commissions fully meets the tests laid down in the *Higgins* case.

So far as we have been able to ascertain, there never has been a case since the enactment of the Revenue Act of 1913 in which trustees' commissions have been disallowed by the Commissioner on the ground that the administration of the trust did not constitute the conduct of business within the meaning of the statutory provision allowing the deduction of business expenses.

Literally hundreds of thousands, possibly millions, of income tax returns have been filed by trustees under the various revenue acts, on which deductions for the trustees' commissions have uniformly been claimed and allowed, as matter of law, entirely irrespective of the nature or extent of the trustees' duties or activities.

The practice of allowing trustees' commissions as business expenses has been evidenced by various Bureau rulings, and there never has been any deviation therefrom:

S. O. 88, 4 C. B. 119;

I. T. 1393, I-2 C. B. 83;

S. M. 2463, III-2 C. B. 91;

I. T. 3163, 1938-1 C. B. 202;

Letter Jan. 16, 1931, from J. C. Wilmer, Deputy Commissioner, to the Corporate Fiduciary Association of New York (Prentice-Hall 1939 Federal Tax Service, p. 7.135).

Those rulings were approved, necessarily albeit impliedly, by the Board in a number of cases in which the Commissioner unsuccessfully contested the allowance of commissions of fiduciaries, or other expenses incurred by estates or trusts, on the ground that they were not "ordinary and necessary" expenses, or were capital expenses, or were chargeable against non-taxable income, or were estate administration expenses allowable only as estate tax deductions. See, for example, *Knox v. Commissioner*, 3 B. T. A. 143 (Acq. V-1 Cum. Bull. 3); *Bendheim v. Commissioner*, 8 B. T. A. 158 (Acq. VII-1 Cum. Bull. 3); *Franklin v. Commissioner*, 11 B. T. A. 148; *Mead v. Commissioner*, 6 B. T. A. 752 (Acq. VII-2 Cum. Bull. 26); *Seligman v. Commissioner*, 10 B. T. A. 840 (Acq. VII-2 Cum. Bull. 36); *Grandin v. Commissioner*, 16 B. T. A. 515; *Ames v. Commissioner*, 14 B. T. A. 1067 (Acq. VIII-2 Cum. Bull. 2); *Chicago Title and Trust Co. v. Commissioner*, 18 B. T. A. 395; *Griffin v. Commissioner*, B. T. A. Memo. Opinion (No. 10,769-G, C. C. H. B. T. A. Service).

The Commissioner did not contend in any of those cases or in any other case, except as stated below, that the administration of the estate or trust was not a business. However, in 1937, after the practice of allowing trustees' commissions as business expenses had been followed without question for twenty-four years, counsel for the Commissioner, in *Watson v. Commissioner*, 35 B. T. A. 706, objected to the allowance of commissions in his brief, on the ground that the administration of the trust was not a business; but the Board overruled that objection, whereupon the Commissioner promptly published notice of his "acquiescence" in the decision (1937—1 C. B. 6, *sub nom Corrigan Estate*).

Never before or since that time, except in the instant cases (so far as we have been able to ascertain), has the Commissioner or his counsel challenged the general practice of allowing trustees' commissions as business expenses of an irrevocable trust, provided it appeared that they were "ordinary and necessary" commissions.¹

¹ In the case of revocable trusts, the Commissioner has attempted in recent years to allocate the trustee's commissions between taxable income and tax-exempt income, and to disallow the portion thereof allocated to tax-exempt income, just as he has done with respect to investment expenses of individuals (See pp. 9-12 of the brief of the undersigned as *Amicus Curiae*, in the *Higgins* case). If it be assumed that such an allocation is justified in the case of an individual, it also may be justified in the case of a revocable trust, because a revocable trust is ignored for tax purposes, or treated as a mere agency, and all the income and deductions are taken on the grantor's return (Sec. 166, Int. Rev. Code; Sec. 19.166-1, Reg. 103). And in *Elliott v. Commissioner*, a B. T. A. unreported memorandum decision handed down on November 27, 1939 (C. C. H., B. T. A. Service, Dec. No. 10,931-A), where the trustee of a revocable trust opposed such an allocation, counsel for the Commissioner contended on the trial that no part of the commissions should be allowed, and the contention was sustained by the Board and

During the period of more than a quarter of a century while this practice has been in effect, the statutory provision allowing deductions for ordinary and necessary business expenses has been re-enacted without material change on twelve occasions.

These repeated reenactments of the statute indicate Congressional approval of the settled administrative interpretation and have, indeed, given to it the force and effect of law. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115.

III.

The administrative practice is sound and should be upheld.

Aside from the concession made by counsel for the Commissioner at the trial, the facts in the record show that the trustee was regularly engaged in the active investment and reinvestment of the trust funds, the accumulation of the income therefrom and the continuous investment of such accumulations. Such activities, requiring constant care, attention, judgment and action, pursued over a period of years, starting with a trust fund of nearly \$8,000,000 which is being increased at the rate of nearly a quarter of a million dollars a year, constitute active, continuous

thereafter by the Circuit Court of Appeals for the Third Circuit on February 21, 1941 (Prentice-Hall Fed. Tax Service for 1941, p. 62,501).

In the case of irrevocable trusts, where the beneficiaries are nonresident aliens, a similar allocation has been made by the Commissioner (I. T. 3163, 1938—1 Cum. Bull. 202). Although there have been sporadic attempts to make such an allocation in the case of income of irrevocable trusts distributable to resident or citizen beneficiaries, the Board has held that allocation is not permissible in such cases. See *Watson v. Commissioner*, *Knöz v. Commissioner*, *Griffin v. Commissioner*, all *supra*.

business within any generally accepted meaning of the term.

The will here involved authorized the trustee to retain investments acquired from the testator and admonished it to be more concerned over the safety of principal than securing a high income yield through hazardous ventures. But the ~~will conferred~~ on the trustee unlimited discretion as to investments and re-investments and the Surrogate directed it to "at all times exercise keen and alert judgment with respect to same". Moreover, the trustee was directed during the minority of the beneficiaries to accumulate and invest all income not required for their support.

The fund aggregated nearly \$10,000,000 during the year in question, spread among at least 83 different income-producing securities, of which nearly \$2,000,000 represented invested income.

The trustee did everything necessary and proper to perform its duties as the administrator of the testator's fortune. Apparently, the trustee was conservative in investing and re-investing the funds. So far as the record discloses, it made comparatively few changes in investments and no in-and-out transactions for speculative profits, but it repeatedly reviewed the investments, constantly studied business, financial and market conditions, and generally exercised unremitting vigilance. At the same time, it regularly invested accumulated income at the rate of nearly a quarter of a million dollars a year.

The decision in *Higgins v. Commissioner*, in which this Court refused to overrule a determination of the Commissioner, approved by the Board, that the regular and continuous activities of an individual in looking after his own investments did not constitute the carrying on of trade or business within the mean-

ing of Section 23 (a), does not require the overruling of the administrative practice of allowing trustees' commissions as business expenses.

In cases where individuals claim deductions for the expense of looking after personal investments, it is difficult to draw the line between expenses which properly may be treated as business expenses and expenses which are of a personal nature, incurred for the mere convenience of the taxpayer. It must be conceded that under certain circumstances an individual investor could do everything necessary to care for his own investments and collect the income therefrom, without incurring the expense of maintaining an office and employing assistants. Although the investments of a very wealthy individual may be so extensive and varied as to make it impossible for him to handle them properly without expense, the difference is only one of degree, and therefore it may be reasonable to conclude that such expenses, even where actually required, are nothing but personal expenses, which are expressly disallowed by the statute.

In the case of a trust, no such consideration is involved. The trustee—the trust estate—can have no personal expenses. There is no individual for whose personal convenience any expenses can be incurred. Unlike an individual investor, the trustee manages the trust funds for the benefit of others.

The trust is a legal and taxable entity, separate from the personality of the testator and the beneficiaries. That distinguishes these cases from *Van Wart v. Commissioner*, 295 U. S. 112, involving a guardianship, which this Court held is not an entity. The decision in the *Van Wart* case might be applicable to a revocable trust, which is not recognized as an entity for income tax purposes, but it

should not be applied to an irrevocable trust, and especially a testamentary trust, such as the trusts here involved.

This court said in *Edwards v. Chile Copper Company*, 270 U. S. 452, that to say that a corporation is not engaged in business is "pretty nearly equivalent" to saying it is "not pursuing the ends for which the corporation was organized, in the cases where the end is profit". That observation applies equally to a trust established for the investment and reinvestment of principal and income accumulations.

Moreover, the trusts in these cases were created for the purpose of accumulating and reinvesting the trust income and thus building up an ever increasing fund. The accumulation and reinvestment of income, instead of its mere collection and distribution, always has been considered an attribute of business activity. See Article 43, Regulation 64; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171.

A corporation formed for the purpose of accumulating and reinvesting the income from capital assets would meet the test of "business" laid down in the Corporation Excise Tax Act of 1909 and the various capital stock tax acts, which impose excise taxes on the privilege of doing business. *Stanley Securities Co. v. United States*, 38 F. (2d) 907 (Ct. Cls.), cert. den. 282 U. S. 845; *Phillips v. International Salt Co.*, 274 U. S. 718.

Trusts organized in *quasi* corporate form for the purpose of investment and reinvestment have been held subject to corporation income taxes on the ground that they were engaged in business. *Brooklyn Trust Company v. Commissioner*, 80 F. (2d) 865 (C. C. A. 2), cert. den. 298 U. S. 659; *City Bank Farmers*

Trust Company v. Graves, 272 N. Y. 1; *Ittleson v. Anderson*, 67 F. (2d) 323 (C. C. A. 2); *Sears, Roebuck & Co., etc. v. Commissioner*, 45 F. (2d) 506 (C. C. A. 7).

The disallowance of the trustee's commissions as deductions in computing the net income of a trust under the income tax law would produce difficult complications and would result in only a slight increase in the public revenues.

The beneficiary of a trust is taxable only on the net income which is either actually distributed to him or currently distributable to him under the provisions of the trust instrument (Sec. 162). The portion of the trust income which is used to pay the commissions of the trustee is not distributable to the beneficiary and, of course, is not distributed to him. Therefore, that portion of the income cannot be taxed to the beneficiary, even if it is disallowed as an income tax deduction.

The only way in which the income tax could be imposed on the trust income used for the payment of trustee's commissions would be to treat it as undistributed trust income, taxable to the trustee [Sec. 161 (b)]. Obviously, the trustee would have the right, in such a case, to provide himself with the money necessary to pay that tax, by withholding a further amount from the beneficiary, whose taxable income would thereby be further reduced.

But the amount of the trustee's tax on the income used to pay the trustee's commission, having been properly withheld from the beneficiary, would itself have to be added to the income on which the trustee would be required to pay tax. That would increase the trustee's tax by a further amount, which in turn

would have to be withheld from the beneficiary, and so on, down to a fraction of a penny.²

So far as trustees' commissions computed on income are concerned, the additional taxes which the Government would receive by the disallowance of such commissions as deductions would be insignificant in amount in the vast majority of cases, where the only "income" taxable to the trusts as separate entities would be the portion of the trust income used to pay the commissions.

Under New York law, the trustee's commission on \$100,000 of income is only about \$2,000, and the tax on \$2,000 which the trust would be compelled to pay would amount, at present rates, to only \$76. On income of \$10,000, the commissions are only about \$200, and the tax on \$200 is only \$4.

Where, as in these cases, the trust income is accumulated, rather than being currently distributable, the income used to pay commissions would be added to the net income accumulated for the beneficiaries, and taxed at the highest applicable rates.

The effect of allowing, or of disallowing, the deduction of commissions computed on and paid out of corpus will be discussed in our next point.

It is submitted that the uniform, settled administrative practice of allowing trustees' commissions as business expenses represents a sound, practical interpretation of the applicable provision of the various revenue acts and should be sustained.

² The problem just referred to would not arise, of course, where, as in the instant cases, all the trust income is accumulated in the trust, instead of being distributable to the beneficiaries, and therefore is taxable to the trust estate as a separate entity. However, it would arise in the far more numerous class of cases in which the trust income is currently distributable to the beneficiaries.

IV.

The commissions in issue, which were computed on and paid out of trust corpus, are nevertheless deductible as "ordinary and necessary" expenses.

The objections specified by Government counsel at the trial to the allowance of the commissions in question were not considered at all by seven members of the Board. Of the other nine members, four were of the opinion that those objections were well taken, while five thought otherwise.

The Court of Appeals based its decision entirely on its holding that the trusts were not entitled to any deductions for "business" expenses. As to whether the commissions in question should be disallowed merely because they were computed on and paid out of trust corpus, the Court of Appeals said that it "might be permissible" to deduct them if the trust were entitled to any "business" deductions.

The commissions of testamentary trustees in New York are computed and paid pursuant to the provisions of Section 285 of the Surrogate's Court Act (printed in the Appendix) which allows commissions computed on the basis of a percentage of the amounts of principal and income received and paid out. The statute provides that the commissions are allowed to the trustee "for his services in such official capacity". It makes no distinction between commissions computed on the basis of principal and those computed on the basis of income; the amounts of principal and income paid out are merely the basis or yardstick for measuring the trustee's compensation.

In *Collier v. Munn*, 41 N. Y. 143, the New York Court of Appeals said, at p. 147, that it was the "obvious intent" of the New York statute "to make the sums, called commissions, compensation, not for the service of receiving and paying, but compensation for the whole services *measured by a fixed standard*". (Italics the court's.)

This was made clear in *Matter of Bushe*, 227 N. Y. 85. In that case, one of three trustees of a testamentary trust died within two years after the death of the testator. On a subsequent accounting, the Surrogate allowed the two surviving trustees full commissions computed on the basis of principal received, but allowed the estate of the deceased trustee only one-half as much, saying that trustees are not entitled to commissions "for the mere act of receiving property", but that "such commissions are allowed for the services of legal representatives in taking care of, investing and reinvesting such property and for the responsibility connected therewith".

The decision was affirmed by the Court of Appeals, which said that "commissions are allowed for the care and management of the estate and not for the simple act of receiving and paying out". The Court of Appeals also quoted with approval from *Matter of Welling*, 51 App. Div. 355, the statement that "commissions are allowed to trustees as compensation for services in the execution of a trust".

The Commissioner insisted below that the commissions in question were paid to the trustee solely for the act of receiving the trust corpus, a single ministerial act performed in 1926, and that the liability to pay such commissions was fully incurred at that time, since the trustee could have secured them im-

mediately upon the creation of the trust, merely by applying to the Surrogate.

The New York law is entirely different. As has been shown, commissions on principal, just like commissions on income, are allowed the trustee for the performance of all its duties in managing and preserving the trust fund. They are not payable for the mere act of receiving or paying out principal. Whether or not a trustee can secure, immediately after the creation of a trust, any part of the commissions computed on principal depends entirely on the discretion of the court. Under the New York law, the trustee's right to the commissions in issue did not accrue until they were approved by the proper court on a judicial settlement of the trustee's accounts. *Matter of King*, 121 Misc. 530. See *Estate of McGlue v. Commissioner*, 41 B. T. A. 1199.

It is clear that trustees' commissions computed on the basis of principal may not be distinguished in any way from those computed on the basis of income and that all such commissions are paid to the trustee for precisely the same services, viz., the administration of the trust throughout its existence.

The fact that the commissions were in part payment for the services of the trustee from the inception of the trusts does not prevent their deduction in full in the year in which they accrued and were paid. *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115.

It is immaterial that the commissions were not an expense of an annual or recurring nature. Even though an expense may be unique in the life of a business, if it is one which is ordinarily and customarily incurred and paid by those engaged in such business, it is deductible under the statute. *Welch v.*

Helvering, 290 U. S. 111, 114; *Kornhauser v. United States*, 276 U. S. 145. Where, as here, the taxpayer is on the cash basis, income must be returned in the year of receipt and deductions taken in the year of payment, because the revenue acts assess the income tax on the basis of annual receipts and disbursements. *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359; *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301.³

The fact that the commissions were charged against principal does not justify their disallowance as deductions. We are not concerned here with the question of whether a trust *beneficiary* may claim as a deduction against trust income actually distributed to him an expense of the trust which was charged against principal and which thus did not reduce the amount distributed.

In the instant cases the tax has been imposed on the trustee as fiduciary, on the basis of the undistributed net income of the trust. Section 162 of the Revenue Act of 1928 provides that in such cases "the net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual".^c See *Freuler v. Helvering*, 291 U. S. 35, 41.

The income tax law, in allowing certain deductions in computing the net income of estates and trusts, makes no distinction between items which are paid out of income and those which are paid out of corpus. For example, estate taxes, which formerly were allowable as income tax deductions, are payable out of the corpus of the estate, but that

³ Fire insurance premiums covering a number of years are deductible when and as they are paid, where the taxpayer makes his returns on the cash basis. *Welch v. Deblois*, 94 F. (2d) 842 (C. C. A. 1); G. C. M. 20307, 1938—1 Cum. Bull. 157.

fact did not prevent their being taken as deductions in computing the estate's net income. *United States v. Woodward*, 256 U. S. 632, affirming 56 Ct. of Cls. 133. Similarly, losses sustained on sales of capital assets by an executor or trustee are allowable deductions in computing the net income taxable to the estate or trust, although such losses are charged against corpus rather than income. The fiduciary returns which the petitioners filed for the year in question (R. 121-124) show on line 6 that deductions were claimed on account of capital losses which were chargeable to the principal of the trusts, and such deductions were allowed by the respondent without question.

Other examples are bad debts and depreciation on real property. Where, as in this case, the trust income is accumulated, the trustee is entitled to deduct depreciation in computing any net income taxable to it, although under the terms of the trust instrument no depreciation is charged in determining the amount of the trust income which is to be accumulated and thus the depreciation actually sustained depletes the corpus of the trust.

The income tax law always has taxed to the trustee, as one fund, all income not distributed or currently distributable to beneficiaries. The law never has divided the taxable income of a trust into two separately taxable funds, one consisting of the trust income which is being accumulated and the other of the capital gains which form a part of the corpus, even though the accumulated income and the corpus eventually will go to different beneficiaries. Also, in computing the net income which is taxable to the trustee, the law by express provision permits the trustee to deduct all items which would be deductible if the trustee were an individual. No distinction is drawn

between deductions which are chargeable against trust income and those which are chargeable against trust corpus.

The trust is a legal and taxable entity wholly distinct from its beneficiaries (*Anderson v. Wilson*, 289 U. S. 20); and where the trust income is not distributable or distributed, but is taxable to the trustee, state laws governing the trustee's accounting as between the classes of beneficiaries who will receive the trust assets do not govern in determining the income tax deductions. The income tax laws have their own criteria for determining income and deductions. *Weiss v. Wiener*, 279 U. S. 333, 337; *Heiner v. Mellon*, 304 U. S. 271, 279; *Greenough v. Commissioner*, 74 F. (2d) 25, 26 (C. C. A. 1).

The provision contained in Section 24(b) of the 1928 Act removes all possibility of doubt on this point. That section provides that the trust income taxable to an income beneficiary of a trust or an estate "shall not be reduced * * * by any deduction allowed by this Act * * * for the purpose of computing the net income of an estate or trust" (except depreciation and depletion) which is not chargeable against such income beneficiary under the applicable rules of local law. That provision shows that Congress understood that all deductions "allowed by this Act * * * for the purpose of computing the net income of [the] estate or trust," are allowable, irrespective of whether they are charged against corpus or against income, and that it therefore required an express provision to prevent a beneficiary from claiming a deduction which did not reduce the income distributable to him.

The fact that an expense is charged against the corpus of the trust does not mean that it is a capital

expense, the deduction of which is disallowed by the tax law. A "capital expense" is an investment in an asset or an expenditure which materially adds to the value of an asset or appreciably lengthens its useful life. Expenditures which merely maintain and preserve an asset—such as the salary of a watchman, the fees of a custodian or the commissions of a trustee—cannot be considered capital expenses. Cf. *Duffy v. Central Railroad*, 268 U. S. 55; *Illinois Central Railroad Co. v. Commissioner*, 90 F. (2d) 458 (C. C. A. 7).

Heretofore, the Bureau has not attempted to draw any distinction between commissions computed on and paid from principal and those computed on and paid from income. In S. M. 2463, III-2 C. B. 91 (December, 1924) it was ruled that trustees' commissions computed on corpus as well as those computed on income are deductible as business expenses, and the Bureau quoted with approval the earlier holding in S. O. 88, 4 C. B. 119, that:

"It is immaterial whether the expenses are paid from the corpus of the estate or from income. The expenses derive their character not from the funds out of which they are paid, but from the purposes for which they are incurred."

See, also, the letter of Jan. 16, 1931, from the Deputy Commissioner to the Corporate Fiduciary Association of New York, cited, *supra*, p. 15).

The repeated re-enactment of the provision allowing expense deductions indicates Congressional approval of that administrative interpretation.

The Government appears to believe that there would be something inherently unfair in allowing commis-

sions paid for the services of the trustee over a period preceding the year in which they are paid, as a deduction against one year's income of the trust. The Government is right, but the allowance of the deduction on that basis, as claimed herein, is unfair to the trusts, not to the Government.

Obviously, if the trustee's commissions on principal could be spread over a number of years or over the entire life of the trust, and an allocable portion thereof claimed as a tax deduction in each year, thus applying against the highest bracket income of each year, the deduction would be of much greater benefit to the trusts than the deduction of such commissions in their entirety in the year allowed by the court.

But the income tax law does not allow any deductions except in the year in which they accrue or are paid and a New York trustee's commissions on principal do not accrue and may not be paid except when and as allowed by the court.

The fact that the trustee cannot get his commissions on principal regularly, in equal amounts every year, should not defeat the right of the trust estate to whatever smaller benefit it can obtain by deducting such commissions as they are allowed and paid.

Conclusion.

The respondent's concession at the trial that the administration of the trusts was a business and that commissions computed on income are deductible as business expenses removed that issue from the case; moreover, the concession was in conformity with long-established administrative practice, and such practice represents a proper interpretation of the law and should be upheld. The decision in *Higgins v. Com-*

missioner, relating to an individual investor, is not controlling in these cases, where the trustee, the taxpayer, managed the estates for the benefit of others, and the estates themselves were separate taxable entities. The commissions in question were ordinary and necessary expenses of the business incurred and paid during the tax year and were paid for the same services as the commissions which the respondent has conceded were business expenses.

The decisions below are erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

SURROGATE'S COURT ACT OF NEW YORK

§ 285. *Commissions of executor, administrator, guardian or testamentary trustee.*

On the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and necessary expenses actually paid by him, and if he be an attorney and counsellor-at-law, of this state, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable; and in addition thereto the surrogate must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity, and if there be more than one, apportion among them according to the services rendered by them respectively.

1. For receiving and paying out all sums of money not exceeding two thousand dollars, at the rate of five per centum.

2. For receiving and paying out any additional sums not amounting to more than twenty thousand dollars, at the rate of two and one-half per centum.

3. For receiving and paying out any additional sums not exceeding twenty-eight thousand dollars at the rate of one and one-half per centum.

4. For all sums above fifty thousand dollars, at the rate of two per centum.

5. The value of any real or personal property, to be determined in such manner as the surrogate may direct, and the increment thereof, received, distributed or delivered, shall be considered as money in making

Appendix.

computation of commissions. But this shall not apply in case of a specific legacy or devise.

6. In addition to the compensation hereinbefore provided the court in its discretion may allow to a guardian of the person a sum of money to be fixed by it and paid by the guardian of the property out of the funds in his hands, which sum shall be for services of such guardian of the person up to the time of such allowance.

7. If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and such executor or trustee renders an annual account to the beneficiary; and such guardian files an annual inventory as required by section one hundred ninety of this act, of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount of income so accounted for as he would be allowed upon principal on a judicial settlement; if such executor, trustee or guardian does not render such annual account or inventory, nor retain his commissions upon his annual account or inventory, he shall be allowed out of income then on hand, if any, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary as unpaid income.

8. If the gross value of the principal of the estate or fund accounted for amounts to one hundred thousand dollars or more, each executor, administrator, guardian or testamentary trustee is entitled to the full compensation on principal and income allowed herein to a sole executor, administrator, guardian or

Appendix.

testamentary trustee, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively. Where the will provides a specific compensation to an executor, administrator, guardian or testamentary trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letter, or in case of a testamentary trustee or guardian, from the date of his filing his oath, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary or letters of general administration, are issued to a person who has previously been appointed a temporary administrator, he is entitled to a total compensation equal to the compensation allowed for the full administration of the estate by a fiduciary acting in a single capacity only. Such total compensation shall be payable in such proportions and upon such accounting as shall be fixed and allowed by the surrogate settling the account of the person holding such successive or different letters but no paying out commissions shall be allowed except upon such sums as shall have been actually paid out at the time of the respective decrees for debts, expenses of administration or to legatees or other beneficiaries.

9. Where an executor, administrator, guardian or testamentary trustee is, for any reason or cause whatsoever, entitled or required to collect the rents of and manage the real property, he shall be allowed and may retain five per centum of the rents collected therefrom in addition to the commissions herein provided.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 408

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE
OF A TRUST UNDER THE LAST WILL AND TESTA-
MENT OF ANGIER B. DUKE, DECEASED, FOR THE
BENEFIT OF ANTHONY NEWTON DUKE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

No. 409

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE
OF A TRUST UNDER THE LAST WILL AND TESTA-
MENT OF ANGIER B. DUKE, DECEASED, FOR THE
BENEFIT OF ANGIER B. DUKE, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of the petition for
writs of certiorari in these cases.

The question involved is whether commissions allowed the trustee of certain trusts for receiving and paying out principal of the trusts are deductible as "ordinary and necessary expenses paid * * * in carrying on any trade or business" within the meaning of Section 23 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791. The court below upheld the denial of the deduction on the ground that the trusts could not be regarded as "carrying on any trade or business." In this respect the court below relied in part upon its decision in *Higgins v. Commissioner*, 111 F. (2d) 795, pending on petition for certiorari, No. 253, October Term, 1940.

The Government has filed a memorandum in the *Higgins* case stating that it did not oppose certiorari because of a conflict among the circuit courts of appeals on the question there presented.

The cases at bar involve trusts, while the *Higgins* case involves an individual, but the question here is sufficiently akin to that in the *Higgins* case to warrant the issuance of a writ of certiorari if certiorari is granted in that case.¹

¹ If certiorari is granted here, the Government will undertake to support the decision below not only upon the broad ground that buying and selling securities in connection with one's investments cannot constitute a "trade or business," but also upon two additional grounds: (1) that, in any event, there was not sufficient activity here to justify classifying these transactions as connected with a trade or business; and (2) that the expenses were not "ordinary and necessary."

For the foregoing reason, the issuance of writs of certiorari in the present cases is not opposed.

Respectfully submitted,

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

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In the Supreme Court of the United States

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**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE**

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R.
31) is reported in 39 B. T. A. 29. The opinion of

(1)

the Circuit Court of Appeals (R. 176) is reported in 112 F. (2d) 457.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 12, 1940. (R. 181-182.) The petition for writs of certiorari was filed September 9, 1940, and granted February 10, 1941. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Commissioner of Internal Revenue conceded before the Board of Tax Appeals that the trusts involved were engaged in carrying on a trade or business, and if so, whether the Board and the court below were precluded thereby from considering the point.
2. Whether the trusts were engaged in carrying on a trade or business within the meaning of Section 23 (a) of the Revenue Act of 1928.
3. Whether certain commissions paid to the trustees were "ordinary and necessary" business expenses.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 27-30.

STATEMENT

The facts, which were in part stipulated (R. 64-71), were found by the Board of Tax Appeals as follows (R. 32-36):

The petitioner, City Bank Farmers Trust Company, is a New York corporation engaged in the business of a trust company in the State of New York. It qualified in September, 1923, as trustee under the will of Angier B. Duke, deceased, and since then has acted as such. (R. 32.)

The will of the decedent created two trusts, one for the benefit of Angier B. Duke, Jr., and the other for the benefit of Anthony Newton Duke. The petitioner received the property of the trusts in the amount of \$3,823,027.79 in each trust in February, 1926. (R. 32.)

The will provided that one-fourth of the residuary estate was to be distributed to the trustee for each of his two sons. The trustee was directed to collect and receive the income, revenues, and profits, and to apply and distribute them to the support, education, and maintenance of the son for his life, and after his death for the support, education, and maintenance of his lineal descendants, payments, applications, and distributions during minority to be under the uncontrolled discretion of the trustee (R. 34-35), with specific provision that (R. 35):

The said Trustee shall have power to hold, manage and invest, and from time to time as

need be, to reinvest the properties held in said Trust for the benefit and advantage of the beneficiaries thereof in such good and productive stocks, bonds or mortgages as will produce, if possible, a sure and regular income.

The said Trustee and its successors shall have power to retain any investments made by me in my lifetime without liability for loss or shrinkage, or to change the property received by it under this will into other property as it deems best for the respective beneficiaries, and to that end it shall have power to sell, assign, transfér, exchange, deliver and convey any property at any time, and it shall invest the proceeds of all such sales and exchanges in any property it thinks best; *but in all investments I charge it and its successors to be more careful as to the security of the funds than as to the acquisition of higher rates of interest, my desire being to have my property prudently and securely managed rather than hazarded in what may promise great gains.*

* * * * *

Said Trustee shall have power to pay all taxes, levies and assessments which may be validly imposed upon the Trust Estate, or any part thereof or in respect thereof, or which may be incurred in the exercise of any of the powers conferred by this will, as well as all costs, charges and expenses of administering this Trust, which shall include adequate insurance, necessary repairs, and com-

pensation to the Trustee for its service as such. [Italics supplied.]

The duties of the petitioner as trustee of the trusts consisted in general of causing its investment committee to review several times each year the securities comprising the corpus of the trusts; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends on securities; paying expenses of the trusts; distributing income to beneficiaries; keeping the books of account of the trusts; rendering statements to the interested parties; and preparing and filing income tax returns. The petitioner was trustee of about 300 other trusts involving similar duties. (R. 36.)

On January 2, 1931, the Surrogate's Court of New York, which had jurisdiction of the trust estates, issued a decree in a proceeding instituted by the petitioner in 1930 for settlement of an intermediate accounting for the period from February 26, 1926, to December 31, 1929, authorizing the petitioner to retain and pay to itself as trustee out of the existing corpus of the respective trust estates, as commissions to which it was entitled under the provisions of the decedent's will, the sums of \$38,641.71 and \$38,641.06. The commissions were computed pursuant to the provisions of Section 285 of the Surrogate's Court Act of New York, on the basis of principal received and paid out by the petitioner as trustee. Subsequently, during the same

months, the petitioner paid the sums authorized by the court to itself as trustee out of the principal of the respective trusts. The amounts so paid were not deducted by the petitioner in income tax returns filed for the taxable year, but petitioner asks in the petition, filed with the Board in each proceeding, for a determination of overassessment in accordance with such payments. Although deductions for other commissions with respect to the current transactions within the taxable year for receiving and paying out income are not listed in the income tax reports filed for the two trusts, and are not mentioned in the deficiency notices, the parties are in agreement that such commissions have been allowed by the Commissioner. The report made to the Surrogate by the petitioner showed commissions retained each year by the petitioner on account of income received and paid out, during the period covered by the report to the Surrogate, the amounts being \$10,663.22 as to one trust and \$10,674.60 as to the other. (R. 32-33.)

The report filed for the period from February 26, 1926, to December 31, 1929, showed an increase of corpus in one trust of \$21,635.44 and in the other of \$21,580.44, and income received of \$962,359.54 as to one of the trusts and \$963,277.83 as to the other; charged expense against principal in the one trust in the amount of \$12,806.75 and in the other of \$12,798.62; charged expense against income of \$29,608.74 as to the one trust and

\$29,815.82 as to the other, which amounts of expense in each case were entirely for payment of state and federal taxes, except \$2.50 for notary fees and \$1 for cost of federal stamps on the transfer of 250 rights in Marland Oil Company. (R. 33.)

For 1931, the income of one estate was \$126,729.09 from interest and dividends (nothing being reported under the heading "Net profit from trade or business"), with loss on sale of securities of \$872.61, while as to the other estate the income was \$126,460.28 from interest and dividends (nothing being reported under the heading "Net profit from trade or business"), with loss on sale of securities of \$1,295.06. The loss of \$872.61 was taken upon the sale for a total price of \$86,670.38 of nine items of bonds and stocks, all acquired in 1926, except two items acquired in 1928 in the total amount of \$238.10. The loss of \$1,295.06 was taken upon the sale of 12 items of bonds and stocks in the total sum of \$90,430.42; all of the items being purchased in 1926, except one item of \$138.91 purchased in 1928. For the year 1931 the income tax report as to the one trust asks deduction of \$5.50 (in addition to taxes paid) and the other asks deduction of \$6.11 (in addition to taxes paid). The ledger of the trust for Angier B. Duke, Jr., for 1931 shows total expense items of \$13.27 charged against principal, being cost of federal stamps and cost of insurance and postage

upon bonds, and \$14.68 being cost of collection of coupons shown as expense against income; also \$30.52 costs and disbursements taxed in the Surrogate's decree of January 2, 1931. The ledger for 1931 for the trust for Anthony Newton Duke shows expense items against principal totaling \$13.03, being the cost of transfer stamps and insurance and postage on transfer bonds; and a total of \$15.71 expense against income, being cost of collection of coupons, and \$1 for transfer stamps; also \$30.53 costs and disbursements taxed in the Surrogate's decree of January 2, 1931. (R. 33-34.)

In 1931, the petitioner, as trustee of each trust, claimed deductions of about \$5,200, and distributed about \$6,300 to the beneficiary thereof out of the gross income, leaving in each case approximately \$115,000 for distribution to the beneficiary when he should become of age. For the taxable year the trustee reported a tax liability of approximately \$13,000, all of which was paid in 1932. The petitioner, as trustee of the trusts, at all times important, kept its books and rendered its income tax returns on the cash basis. (R. 34.)

The current diary of action taken by the trustee in the estate of Anthony Newton Duke shows 18 items throughout the year 1931, while the current diary in the estate of Angier B. Duke, Jr., shows 19 items. With one exception, the two diaries are duplicates. The investments referred to are all bonds and stocks. (R. 36.)

Generally trustees administering estates under the laws of New York do not make application to the court for trustee's commissions until reason exists for filing an accounting with the court. The accounting was filed in 1930 in order to obtain the court's construction of provisions of the decedent's will. (R. 36.)

Upon these findings, the Board, with five members dissenting, held that the trusts were not engaged in carrying on a trade or business, and accordingly disallowed the claimed deduction. (R. 42.) The court below affirmed. (R. 176-182.)

SUMMARY OF ARGUMENT

I

The question whether the trusts were engaged in carrying on a trade or business was open for consideration below. The question was drawn in issue by the pleadings and there was no withdrawal or concession of the point in the opening statement of counsel for the Commissioner. In any event the point may be considered to support the decision below. Since the petitioner availed itself of the opportunity of putting in evidence concerning the activities of the trusts, which showed the complete activities during the taxable year, and since it does not state what additional evidence it is able to produce which would have a material bearing upon the question under consideration, no reason appears for remanding the cases to the Board.

II

The trusts involved here were the usual type of family settlement trust. The trustee was not authorized to carry on a trade or business. The trusts were created to provide for a prudent management of the investments which the settlor had made during his lifetime, and it was contemplated that changes in the investments would be made only when required to further the best interests of the beneficiaries. A power of sale was given only to the end that these changes could be made, and was not given for the purpose of trading in the market. The evidence does not show that there has ever been any trading in the market for the purpose of making a profit from such activity. These trusts were mere investors or passive recipients of income, with incidental activities, and neither trust was engaged in a trade or business. The deduction of trustee's commissions was therefore properly disallowed on that ground.

III

The disallowance of the trustee's commissions in controversy may be supported on the further independent ground that they were not ordinary and necessary business expenses. A deduction for an ordinary and necessary business expense may be taken only if the liability was a proximate result of or was directly connected with the taxpayer's business. The right to the commissions in contro-

versy accrued under the statute by virtue of receiving the corpus, and if no business had ever been carried on by the trustee, it would nevertheless have received these amounts. The commissions were actually paid out of corpus, and are more nearly akin to capital expenditures than to current charges against the production of income.

ARGUMENT

I

THE QUESTION WHETHER THE TRUSTS HERE INVOLVED WERE ENGAGED IN CARRYING ON A TRADE OR BUSINESS WITHIN THE MEANING OF SECTION 23 (A) OF THE REVENUE ACT OF 1928 WAS IN ISSUE BEFORE THE BOARD. IN ANY EVENT, THE BOARD AND THE COURT BELOW PROPERLY CONSIDERED THE POINT

The petitioner seeks a deduction from gross income for the year 1931 of commissions allowed to the trustees based upon the receiving and paying out of principal of two trusts, on the ground that these commissions were "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" under the provisions of Section 23 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791, *infra*, p. 27. The deductions were not claimed in the returns filed by the trusts, but were sought for the first time in the trustee's petitions to the Board of Tax Appeals. The petitioner concedes (Br. 11) that the pleadings before the Board placed in issue the questions (1) whether the commissions were ordinary and necessary expenses and (2) whether they were in-

curring in carrying on a business. The petitioner contends, however (Br. 11-13), that counsel for the respondent in his opening statement before the Board conceded that the administration of the trusts constituted a business within the meaning of Section 23 (a) and that that issue was thus removed from the cases.

While counsel for the respondent did state to the Board (R. 103-104) that ordinary commissions of the trustees with respect to the current transactions within the taxable year for receiving and paying of income and all other expenses incurred in connection with the production of income in the taxable year had been allowed by the respondent as deductions as business expenses, and while the commissions on income and the other expenses were properly allowable only if the trusts were in business, there was, we submit, no express concession by counsel that the trusts were engaged in business. In the brief filed by the respondent it was urged that the trusts were not engaged in business and the Board placed its decision upon that ground. Furthermore, it seems clear from the opinion of the Board that it considered that the question whether the trusts were carrying on a business was in issue prior to the filing of the respondent's brief, for it distinguished the case of *Watson v. Commissioner*, 35 B. T. A. 706, on the ground, *inter alia*, that in that case the present question apparently arose only when the brief was filed by respondent.

(R. 37.) The petitioner filed a motion for reopening and reconsideration in the present cases, but the grounds of this motion do not appear in the record. The motion was denied by the Board (R. 44) upon the authority of *Kane v. Commissioner*, 100 F. (2d) 382 (C. C. A. 2d), which had held that commissions paid by the taxpayer in that case to a trust company for collecting her income and the sum paid to the taxpayer's brother, who took care of the taxpayer's investments, for expenses of employing a bookkeeper and of renting an office, were not expenses of carrying on a trade or business within the meaning of the revenue act.

We submit that the petitioner was informed of the issues by the pleadings in these cases and that there is no showing that it was in any respect misled by anything in the opening statement before the Board of counsel for the respondent. Neither in the court below nor in this Court does the petitioner suggest that it would have been able to produce additional evidence bearing upon the issue whether the trusts were engaged in business. On the contrary, extensive evidence was introduced by the petitioner which would have been relevant and material only if the question whether the trusts were carrying on a business was one of the issues before the Board.

Moreover, even if the question whether the trusts were carrying on a business were not one of the issues before the Board, there was no im-

propriety in the consideration of that point by the court below as a ground for supporting the Board's decision. *LeTulle v. Scofield*, 308 U. S. 415; *Helvering v. Gowran*, 302 U. S. 238. In those cases this Court held that a respondent or appellee may urge any matter appearing in the record in support of a judgment. In the *Gowran* case this Court further stated, however, that if the appellate court affirms a decision upon a new issue, it is open to the petitioner or appellant to urge that he should have the opportunity to establish before the trial body any additional facts which would affect the result. In the present cases the petitioner does not seek an opportunity for the presentation of further facts, but takes the narrow position that the point was not open for consideration by either the Board or the appellate court. We believe that this position of the petitioner is without merit. See also *Hormel v. Helvering*, No. 257, present Term, decided March 17, 1941.

II

THE TRUSTS WERE NOT ENGAGED IN CARRYING ON A TRADE OR BUSINESS

1. Section 162 of the Revenue Act of 1928, *infra*, p. 27, provides that the net income of an estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, with certain exceptions which are not pertinent here.

Section 23 (a) of the Revenue Act of 1928, *infra*, p. 27, provides that in computing net income there shall be allowed as a deduction all the "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business".

The deduction in question may be allowed only if (1) the trusts were carrying on a trade or business during the taxable year, and (2) the commissions were ordinary and necessary expenses of the trade or business. We submit that neither of these tests is met.

A majority of the Board of Tax Appeals held that the trusts did not carry on a trade or business during the taxable year and stated that it was unnecessary to pass upon the other question whether the deduction sought was an ordinary and necessary expense.¹ The court below affirmed on the ground that the trusts were not engaged in business.

On the question whether the trusts here involved were engaged in business, the cases are controlled by *Eiggins v. Helvering*, No. 253, present Term, decided February 3, 1941. That case involved an individual, while the present cases involve trusts, but we submit that this difference is not decisive. Surely, Mr. Higgins would not have been entitled

¹ Four members, who agreed with the majority that the trusts were not engaged in a trade or business, also expressed the view that the commissions in controversy were not "ordinary and necessary expenses". Five members dissented.

to the deductions which he unsuccessfully claimed merely by placing his investments in trust. The critical controversy is simply whether the activity in question constitutes the carrying on of a trade or business.

The trusts here in question were the usual type of family settlement trusts. The trustees were not authorized to continue the business, if any, which might have been carried on by the testator, nor were they authorized to engage in any new business, as the term business is generally understood. Particular property was bequeathed to the trustee to hold, manage, and invest, and from time to time as need be to reinvest the properties held in trust "in such good and productive stocks, bonds or mortgages as will produce, if possible, a sure and regular income", and to pay the income therefrom to named persons during their lives with remainders over. (R. 75-77.) The trustee was authorized to retain any investments made by the decedent in his lifetime without liability for loss or shrinkage. The trustee was further authorized to "change" the property received by it under the will as it deemed best for the respective beneficiaries, and "to that end" the trustee was given the power to sell, assign, transfer, exchange, deliver, and convey any property at any time, and to invest the proceeds of all sales and exchanges in any property it thinks best, and it was charged by the decedent in all investments "to be more careful

as to the security of the funds than as to the acquisition of higher rates of interest, my desire being to have my property prudently and securely managed rather than hazarded in what may promise great gains." (R. 78.) The decedent further expressed the wish that the trustee should advise and consult with his executors and his uncle upon and with reference to the sale or exchange of any property received by it under the will or with reference to any investment or reinvestment of funds or money coming into its hands before making the same, to aid but not to control the trustee's discretion. (R. 79.)

Insofar as the actual handling of the trusts is concerned, it does not appear from the present record that at any time during the existence of the trusts has there been any trading in stocks, bonds, or other property with the purpose of making a profit from such trading. The officer of the petitioner in charge of these trusts testified (R. 113):

At the time the corpus was received the principal consisted of bonds and stocks; there were holdings of the Duke Power Company in each trust; they were the chief holdings, and they were still held up until 1931, without material change, unless they were added to. The trustee may have bought more Duke Power Company stocks or bonds during that time, but as far as I know they still have what they started out with. Money was paid out to the benefi-

aries from time to time, and the remaining amount of income was invested.

Such sales as have occurred of trust assets have been few in number and have been for purposes other than realizing a profit. In the Anthony Newton Duke trust, there were sales in January, 1931, of four blocks of bonds for an aggregate sale price of \$60,646.28. These sales were for the purpose of paying the trustee its commission of \$38,641.71, allowed by the order of the Surrogate Court, and to make up a deficit in cash account of the principal of the trust. (R. 125, 157.) In July, 1931, \$18,000 of bonds of the State of Montana and the County of Duval of Florida were redeemed, and the proceeds were reinvested in tax-free municipal bonds. (R. 126, 158-159.) In December, 1931, the offer of the American Tobacco Company to purchase 100 shares of American Cigar Company stock for \$7,996 was accepted, and the proceeds were reinvested in January, 1932, in non-taxable municipal bonds. (R. 126, 161.) The only other transactions in the corpus of this trust during 1931 were the sales in June and September of certain warrants on Aluminum, Ltd., stock for a total of \$238.10. (R. 126.) The following diary entry on this latter transaction clearly reflects the nature of the present trust as one for the conservation of property (R. 160):

Under date of September 3rd, Mr. W. R. Perkins has answered our inquiry of Sep-

tember 2nd, in reference to the sale of the warrants expiring Oct. 1 on the Aluminum, Ltd. stock. He says: "Replying to yours of the 2nd, do you consider yourselves authorized by the terms of the Trust to exercise these warrants and make that kind of an investment? While we think well of the future of the company and realize what we hope is the abnormal lowness of all things now, it is not an investment for trust funds." We are accordingly proceeding to sell the warrants.

During the entire year 1932, the only sale recorded in the capital account of this trust was one on July 21 to reverse as of July 6 a purchase made on that date (perhaps because the entry should have been in the income account). (R. 126.)

Other than the activities incident to the collection and distribution of income, the only further transactions by the trustee in 1931 were in connection with the investment of the undistributed income, all of which was used to buy tax-free municipal bonds. (R. 157-162.)

The Angier B. Duke, Jr., trust was handled in substantially the same manner as the trust for his brother. (R. 114, 141-142, 163-168.)

It is apparent, we submit, that the trustee of these trusts was neither authorized to trade or speculate in securities nor has it ever undertaken so to do. Indeed, in view of the terms of the will which created these trusts, the trustee was for-

bidden by state law from trading or speculating or engaging in business. *Warren v. Union Bank of Rochester*, 157 N. Y. 259; *In re Kinreich's Estate*, 244 N. Y. Supp. 357; 2 Scott on Trusts, Sections 227.6, 230.4. Such buying and selling as did occur were merely isolated transactions incidental to the proper conservation of the trust property. The activities of the trustee were limited to those traditionally carried on by a strict trust. The activities of the trustee were not different in either kind or degree from the activities of the individual taxpayer in the *Higgins* case, and there is, we submit, no justification for the contention that the activities constitute a business merely because they are engaged in by a trust. No case cited by the petitioner and none that we have found holds that activities which would not be a business when engaged in by an individual become a business when engaged in by a trust. To sustain the contention of the petitioner in these cases would be tantamount to holding that *all* trusts carry on a business within the meaning of the revenue act. Both reason and authority are opposed to that view. See *White Trust v. Commissioner* (C. C. A. 3d), decided October 9, 1940, not yet officially reported but found in 1940 C. C. H., Vol. 4, par. 9712, now pending on petition for rehearing; *George Vanderbilt Trust v. Commissioner*, 36 B. T. A. 967; *Estate of Mary R. Donald v. Commissioner*, 43 B. T. A. —, decided March 25, 1941. Cf. *Morrissey v. Commissioner*, 296 U. S. 344, 356—

357.² Yet, it is implicit in petitioner's brief, if not explicit in the *amicus curiae* brief submitted on behalf of the Committee of Banking Institutions on Taxation, that what is sought here is a declaration that *all* trustees' commissions are deductible. But since the statute allows the deduction only in connection with the carrying on of a trade or business, it is obvious that such position can not be supported.

The cases cited by the petitioner (Br. 20-21), which held that the trusts there under consideration were taxable as corporations, involved trusts which were actively conducting an investment business or were buying and selling securities for the benefit of the investors. The activities of the trusts in those cases, however, were different in kind and degree from the activities of the trusts in the present case. Those cases recognize a distinction between a strict trust and a business trust. There can be no doubt, we submit, that the trusts here involved were strict trusts, and accordingly it should be held that they were not carrying on a trade or business within the meaning of Section 23 (a).

² Indeed, there are numerous cases holding that even corporations which are in the position of passive recipients of income do not carry on a business. *McCoach v. Minehill Railway Co.*, 228 U. S. 295; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503; *United States v. Emery*, 237 U. S. 28; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187.

2. The petitioner urges (Br. 13-17) that under settled administrative practice trustees' commissions have uniformly been allowed as business expenses and that this practice has been approved by Congress through repeated reenactment of the statute. A similar contention was made in the *Higgins* case, and petitioner's position here rests upon no firmer ground.

Concededly, there are no treasury regulations in point. Five informal rulings are relied upon by the petitioner. The first of these, S. O. 88, 4 Cum. Bull. 119, 120, promulgated in 1921, was based upon the proposition that "It is settled that where substantially the entire income of a taxpayer is received from investments and dealings in securities, such investments and dealings in securities constitute the carrying on of a trade or business". The ruling further stated (pp. 120-121): "In this case the executors are engaged in trade or business only to the extent that they continue the business of the decedent, and only such expenses as are incurred in continuing the business of the decedent are allowable deductions in computing net income".

The next ruling relied upon by the petitioner, I. T. 1393, I-2 Cum. Bull. 83, promulgated in 1922, merely stated that under a liberal interpretation of the law, trustees' commissions are deductible from the gross income of the trust estate. S. M. 2463, III-2 Cum. Bull. 91, promulgated in 1924,

quotes from and follows S. O. 88, and the remaining two rulings in turn follow S. M. 2463.

The trusts which are involved here were created in September, 1923, by a will executed in December, 1922. At the time of the execution of the will less than two years had elapsed since the promulgation of the first ruling relied upon by the petitioner, and of course no argument can be made that the decedent acted upon a long and consistent administrative practice.

All of the rulings proceed upon the theory that where substantially the entire income of an individual is received from investments and dealings in securities, such investments and dealings in securities constitute the carrying on of a trade or business,^{*} and consequently that when an estate or trust continues these activities it also is engaged in a business. The decision of this Court in *Higgins v. Helvering*, *supra*, demonstrates that the rulings were based upon a false premise. Since the premise falls with the *Higgins* case, the rulings based upon that premise should no longer be accepted. Cf. *Estate of Sanford v. Commissioner*,

^{*} See O. D. 877, 4 Cum. Bull. 123 (1921), issued contemporaneously with S. O. 88. On February 24, 1941, O. D. 877 was revoked as being inconsistent with this Court's decision in the *Higgins* case. See I. T. 3452, 1941-8 Int. Rev. Bull. 4. In the issuance of this latter ruling, the Treasury refrained from revoking S. O. 88, S. M. 2463, and other rulings of similar import because of the pendency in this Court of the present case and *United States v. Pyne*, No. 683, present Term.

308 U. S. 39, 53-54; *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16; *Morrissey v. Commissioner*, 296 U. S. 344, 354.

Furthermore, the rulings relied upon were not promulgated by the Secretary of the Treasury and therefore are of little aid in interpreting the statute. *Helvering v. N. Y. Trust Co.*, 292 U. S. 455, 467-468; *Biddle v. Commissioner*, 302 U. S. 573, 582. In addition, the practice in respect of estates and trusts has not been consistent. See *Watson v. Commissioner*, 35 B. T. A. 706; *George Vanderbilt Trust v. Commissioner*, 36 B. T. A. 967; *Refling v. Commissioner*, 17 B. T. A. 327, affirmed, 47 F. (2d) 859 (C. C. A. 8th); *Ames v. Commissioner*, 49 F. (2d) 853 (C. C. A. 8th). In short, the administrative practice in respect of estates and trusts is not materially different from the administrative practice which this Court held not controlling in *Van Wart v. Commissioner*, 295 U. S. 112, and *Higgins v. Helvering, supra*, and, we submit, it should not be accepted as controlling here.

III

THE TRUSTEE'S COMMISSIONS WERE NOT AN ORDINARY AND NECESSARY BUSINESS EXPENSE

Four members of the Board, although agreeing with the majority that the trusts were not engaged in a trade or business, were also of the opinion that the commissions in controversy could not be said to be "ordinary and necessary expenses", even if

the trusts were engaged in a trade or business. (R. 42-43.)

The commissions in the case of the Anthony Newton Duke trust were allowed for receiving the sum of \$3,844,663.23 of principal and for paying out the sum of \$12,806.75 of principal, and in the case of the Angier B. Duke, Jr., trust for receiving \$3,844,608.23 of principal and for paying out \$12,798.62 of principal. (R. 87-88.) The trustee was directed by the Surrogate Court to pay these commissions out of principal. (R. 87-88.)

It is settled that a deduction for an ordinary and necessary business expense may be taken only if the liability was a proximate result of or was directly connected with the taxpayer's business. *Kornhauser v. United States*, 276 U. S. 145, 153. It would seem that the expenditures in question are more nearly akin to capital expenditures than to the ordinary and necessary expenses of operating a business. Cf. *Welch v. Helvering*, 290 U. S. 111. The right to the commissions, constituting one-half of the statutory allowance, accrued under the statute by virtue of receiving the corpus. See *Matter of Schinasi*, 277 N. Y. 252, 264. If no business had ever been carried on by the trustee, it would nevertheless have received these amounts. *In re Allen*, 96 N. Y. 327. The fact that they were paid out of corpus, if not conclusive, is at least persuasive evidence that the expenditures were not made to "carry on" the busi-

ness, if any was engaged in. Cf. *Vernor v. United States*, 23 F. Supp. 532 (C. Cls.); *Bing v. Helvering*, 76 F. (2d) 941, 942 (C. C. A. 2d); *Mahler v. Commissioner*, 32 B T. A. 644.

We further submit, therefore, that the payments here sought to be deducted did not proximately result from and were not directly connected with any business carried on by the trusts and accordingly were not ordinary and necessary business expenses. The decision below may accordingly be supported on this additional, independent ground.

CONCLUSION

The judgments of the Circuit Court of Appeals are correct and should be affirmed.

Respectfully submitted.

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SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
ARNOLD RAUM,
LEE A. JACKSON,

Special Assistants to the Attorney General.

MARCH, 1941.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an addi-

tional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 121. *Business expenses.* — Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 141-271. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. (See article 55.) Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see article 122), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. A taxpayer is entitled to deduct the necessary expenses paid in carrying on his business from his gross income from whatever source. As to items

not deductible, see section 24 and articles 281-281.

ART. 282. *Capital expenditures.*—Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are not deductible from gross income. (See section 23 (k) and article 201.) Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. The amount expended for architects' services is part of the cost of the building. Commissions paid in purchasing securities are a part of the cost price of such securities. Commissions paid in selling securities are an offset against the selling price. Expenses of the administration of an estate, such as court costs, attorneys' fees, and executors' commissions, are chargeable against the corpus of the estate and are not allowable deductions. Amounts to be assessed and paid under an agreement between bondholders or shareholders of a corporation, to be used in a reorganization of the corporation, are investments of capital and not deductible for any purpose in returns of income. (See article 67.) An assessment paid by a shareholder of a national bank on account of his statutory liability is ordinarily not deductible but, subject to the provisions of the Act, may in certain cases represent a loss. Expenses of the organization of a corporation, such as incorporation fees, attorneys' and accountants' charges, are capital expendi-

tures and not deductible from gross income. A holding company which guarantees dividends at a specified rate on the stock of a subsidiary corporation for the purpose of securing new capital for the subsidiary and increasing the value of its stock holdings in the subsidiary may not deduct amounts paid in carrying out this guaranty in computing its net income, but such payments may be added to the cost of its stock in the subsidiary.

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Nos. 408, 409

Office - Supreme Court, U. S.

FILED

MAR 28 1941

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1940

CITY BANK FARMERS TRUST COMPANY, as Trustee of a
trust under the Last Will and Testament of Angier B. Duke, deceased,
for the benefit of Anthony Newton Duke,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

and

CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke, deceased, for
the benefit of Angier B. Duke, Jr.,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS
AMICUS CURIAE AND BRIEF.

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No. 408, 409

IN THE

Supreme Court of the United States,

OCTOBER TERM 1940

CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the benefit of Anthony Newton Duke,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

and

CITY BANK FARMERS TRUST COMPANY, as Trustee of a trust
under the Last Will and Testament of Angier B. Duke,
deceased, for the benefit of Angier B. Duke, Jr.,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE.

MOTION

Now comes the undersigned and moves for leave to file the annexed brief as *amicus curiae* on behalf of the Committee of Banking Institutions on Taxation, which Committee consists of many national and state banks and trust companies that act as trustees of numerous testamentary

and *inter vivos* trusts, the consent of counsel for the petitioner and that of counsel for the respondent in each case having been first obtained.

Respectfully submitted,

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New York, N. Y.

Counsel for the Committee of
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Of Counsel:

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WHITE & CASE,
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New York, N. Y.

Brief of Amicus Curiae

Argument

The Committee of Banking Institutions is composed of many banks and trust companies which have for many years administered as trustees a large number of testamentary and *inter vivos* trusts. In that capacity these institutions have filed thousands of federal income tax returns from the time of the enactment of the first income tax laws to the present time and have consistently deducted the necessary commissions paid to trustees. The deductions have consistently been allowed by the Treasury Department without question. No question concerning the deductibility of these commissions was ever raised by the Treasury Department in such a way as to constitute any challenge of the general rule until 1937 and even then the objection to the deductions was made simply to bolster a disallowance originally made because of some special circumstance involved.

The uniform practice of the Bureau of Internal Revenue in allowing trustees' commissions is shown in a number of rulings covering the period from 1921 to 1938. S. O. 88, 4 C. B. 119; I. T. 1393, I-2 C. B. 83; S. M. 2463, III-2 C. B. 91; I. T. 3163, 1938-1 C. B. 202. If these rulings stood alone they might not have sufficient dignity to be determinative. Cf. *Higgins vs. Commissioner*, No. 253, this Term. The significance of the rulings is greatly enhanced, however, when they are shown to represent the Treasury's views for many years without change or direct challenge until the cases at bar.

During the very period in which the Commissioner had successfully resisted the allowance of deductions for the expenses of investment management in the case of individuals, the ruling in I. T. 3163, *supra*, was published. The ruling was issued in February, 1938, and provided, in part:

"As a general rule commissions or service charges of trustees constitute allowable deductions in computing the net income of an irrevocable trust."

In October of 1936 the Board of Tax Appeals had sustained the disallowance of deductions for custodian fees, secretary's salary and office rent in the case of an individual, the Board ruling that the taxpayer, as passive investor, was not engaged in a trade or business. *Heilbroner vs. Commissioner*, 34 B. T. A. 1200. Upon a similar ground the Commissioner was sustained in *Kales vs. Commissioner*, 34 B. T. A. 1046, with respect to the deductibility of certain fees paid in connection with suits to recover Federal income taxes in the case of an individual taxpayer. The decisions of the Board in the two cases were affirmed in December, 1938, and January, 1939, respectively. *Kane vs. Commissioner*, 100 F. (2d) 382 (C. C. A. 2nd); *Kales vs. Commissioner*, 101 F. (2d) 35 (C. C. A. 6th). Thus, while attacking the propriety of deductions for expenses incurred in the management of private estates, the Bureau officially recognized trustees' fees as proper allowances by a newly published ruling. In this setting we submit that I. T. 3163, *supra*, represents an evidence of administrative practice of much greater weight than might otherwise be associated with an office ruling. Furthermore, we think it constitutes a recognition by the Bureau that trustees' commissions are expenses of such a character as not necessarily to be governed by considerations applicable in the case of expenses incurred by private investors.

The Commissioner has from time to time contested the allowance of trustees' commissions because of special circumstances involved. Thus, in *Knox vs. Commissioner*, 3 B. T. A. 143 (Acq. V-1 Cum. Bull. 3) the Commissioner asked disallowance of a part of trustees' commissions on the ground that such part of the commissions were allocable to tax exempt income, and in *Bendheim vs. Commissioner*, 8 B. T. A. 158 (Acq. VII-1 Cum. Bull. 3) the Commissioner proposed to disallow such part of trustees' fees as were not, in his opinion, deductible in the particular taxable year because they were paid on account of income received and disbursed by the trustee in a previous year. There has been only one case, however, until the cases at bar, in which the general rule of allowance referred to in I. T. 3163 has been challenged by the Commissioner. In *Watson vs. Commis-*

sioner, 35 B. T. A. 706, the Commissioner contended that trustees' commissions were not deductible because the trust was not conducting a business. The Commissioner did not take this view in the particular case to secure disallowance of all the trustees' commissions paid but only in support of his action disallowing the proportion of the commissions allocable to tax exempt interest. Upon losing the case the Commissioner acquiesced. 1937-1 C. B. 5 sub. nom. *Corrigan Estate*. It is significant, we submit, that there have been no cases directly raising the issue whether ordinary trustees' commissions are deductible expenses in spite of thousands of instances over a period of many years in which such deductions have been claimed. There has been no occasion for litigation with respect to that question because trustees' commissions have regularly been allowed without any dispute except where some special circumstance was present. There has been, therefore, a settled administrative practice in this respect evidenced by Bureau rulings (the last of which was published at a significant moment as pointed out above), by absence of any direct challenge on the part of the Commissioner, and by the regular allowances granted in innumerable instances over a period of years.

In only two cases prior to the cases at bar has the Commissioner supported a disallowance of trustees' expenses other than trustees' commissions by the contention that the trust was not engaged in business. Thus, in *George Vanderbilt Trust vs. Commissioner*, 36 B. T. A. 967, involving attorneys' fees paid in connection with lawsuits to secure additions to the trust corpus, the Commissioner's principal contention appears to have been that the expenses were isolated, unusual and capital in nature but the additional suggestion was made that the trust was not engaged in a business to which the fees were to be properly regarded as an incident. It appears that the Commissioner probably allowed trustees' commissions without any question. See 36 B. T. A. 971. In *Dorr vs. U. S.*, 18 F. Supp. 92 (D. Mass.), trust expenses incurred to secure investment advice were disallowed but no question of trustees' commissions was involved and the disallowance of the expenses appears to

have originated because there was an undetermined portion of the expenses which were clearly not deductible because they had been incurred in connection with the drafting of the trust instrument. In *White Trust vs. Commissioner* (C. C. A. 3rd) decided October 9, 1940, not officially reported but printed in 40 C. C. H., Vol. 4, Par. 9712, after the decisions in the cases at bar, trust expenses similar to those involved in the *Vanderbilt Trust* case were disallowed but again no question of trustees' commissions was raised. In the *White Trust* case the Board supported the Commissioner on the ground that the expenses were not "ordinary and necessary" (40 B. T. A. 664, 671) but the Circuit Court of Appeals concluded that the trust was not engaged in business. In so deciding the Court relied heavily upon the decision rendered by the Circuit Court of Appeals in the cases at bar. So far as we have been able to discover, these are the only cases involving expenses of trusts.

It will be noted that the earliest of the cases discussed in the preceding paragraph did not arise until 1937. Thus, ever since the enactment of the income tax law, a period of over twenty years, there has been a uniform practice of allowing all the ordinary and necessary expenses in connection with the administration of trusts and only in special circumstances and on special grounds has the Treasury Department contested trust expenses. Thus, the consistent practice with respect to trustees' commissions has not been a fortuitous circumstance but is a part of a long standing administrative attitude toward trusts generally under which all the ordinary and necessary expenses incurred in trust administration have been uniformly allowed.

Cases involving expenses of decedents' estates in the process of administration are to be distinguished from the cases at bar. In the ordinary case executors' duties are limited to those of liquidation and distribution. See *Ref-ling vs. Burnet*, 47 F. (2d) 859 (C. C. A. 8th); *Ames vs. Commissioner*, 49 F. (2d) 853 (C. C. A. 8th). Executors' activities are not unlike those of trustees of so-called "liquidating" trusts which have been held not to have been engaged in business so as to be taxable as corporations.

Mortgage Trust Certificate Pool vs. Commissioner, 42 B. T. A. 1258; *Broadway-Brompton Liquidation Trust vs. Commissioner*, 34 B. T. A. 1089. With such trustees, as with executors, the dominant purpose is liquidation; management and the production of income are only incidental. With trustees such as in the cases at bar, the dominant purposes are management, production of income and the devotion of the income to the purposes prescribed by the grantor. The executors' duties are to be discharged as soon as possible or practicable and are then to cease. The ordinary trustees' duties are to continue over a period frequently of indefinite duration when, as here, measured by lives.

There is no precise formula for determining what activities must be regarded as amounting to the conduct of a business. As this Court pointed out in *Higgins vs. Commissioner*, *supra*, the determination of the question for different tax purposes and with respect to different types of taxpayers may present "dissimilar" issues for decision. Under the law the trusts here have become new taxpayers disassociated from the grantor and operating in a manner vastly different from that of an individual taxpayer. Particularly is this true of testamentary trusts such as are involved in the cases at bar. It cannot be said, therefore, that the Treasury Department has been obviously wrong or has clearly misinterpreted the law in concluding that wise administration requires different treatment with respect to trusts from that accorded individual taxpayers. In the case of commissions paid trustees for the management of property of irrevocable and testamentary trusts, there is no disturbing confusion between personal and business expenses and consequently there is no need to protect the revenue against improper claims by imposing the same rules on such trusts as may be deemed applicable to individual taxpayers. It would not be unreasonable, we submit, for the purpose at hand that such trusts should be governed by the same considerations that are applicable to corporations under the capital stock tax regulations (Reg. 64, Art. 43) or that are applied for income tax purposes to trusts

operating in a form analogous to that of corporations. *Brooklyn Trust Company vs. Commissioner*, 80 F. (2d) 865 (C. C. A. 2nd) cert. den. 298 U. S. 659. In such cases when broad powers of management are granted and exercised as in the cases at bar, the corporations and quasi corporations are found to be engaged in business. Finally, as pointed out in the main brief of the petitioner in these cases (pp. 21-22), the Treasury's practice of allowing the deduction of trustees' commissions has avoided the confusion that would be involved in the application of a different rule under which, with respect to trusts whose income is fully distributable to beneficiaries, the respective income taxes of the trusts and the beneficiaries could be accurately determined only by the use of an algebraic formula. The Treasury's consistent practice is, therefore, not unsound as a matter of law and there are considerations of administrative importance to support it. Consequently, there is no compelling reason for this Court to overturn it.

CONCLUSION

There has been a settled administrative practice under which trustees' commissions such as are ordinary and necessary have uniformly been allowed as deductions. The practice is not contrary to law and is administratively sound. This Court should uphold the practice.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 408 and 409.—OCTOBER TERM, 1940.

City Bank Farmers Trust Company, as
Trustee of a Trust Under the Last Will
and Testament of Angier B. Duke, De-
ceased, for the Benefit of Anthony New-
ton Duke, Petitioner,

408

vs.

Guy T. Helvering, Commissioner of In-
ternal Revenue.

City Bank Farmers Trust Company, as
Trustee of a Trust Under the Last Will
and Testament of Angier B. Duke, De-
ceased, for the Benefit of Angier B. Duke,
Jr., Petitioner,

409

vs.

Guy T. Helvering, Commissioner of In-
ternal Revenue.

On Writs of Certio-
rari to the United
States Circuit Court
of Appeals for the
Second Circuit.

[April 28, 1941.]

Mr. Justice BLACK delivered the opinion of the Court.

The ultimate question here involved is whether two testamentary trusts of which petitioner is trustee were in 1931 "carrying on business" within the meaning of section 23(a) of the Revenue Act of 1928.

Pursuant to the will of Angier B. Duke, two trusts, consisting of stocks and bonds worth approximately \$7,600,000, were established in 1923 for the benefit of Duke's two minor sons. Petitioner, as trustee, was charged with the duty of applying a sufficient amount of the income of each trust to the support and education of the beneficiary; the surplus income was to be accumulated until the beneficiary's majority; and at that time all accumulated income was to be paid to the beneficiary, while the

principal was to be continued in trust for the benefit of the son and his descendants. By 1931, the principal and accumulated income of the two trusts aggregated about \$10,000,000. In that year the Surrogate Court of New York County allowed trustees' commissions of about \$77,000, ordering that payment be made out of principal. In reporting trust income for 1931, the trustee did not claim any deduction for these commissions. Later, in proceedings before the Board of Tax Appeals, the deduction was claimed but denied. The ground of denial was that during the taxable year the trusts had not been "carrying on any trade or business", the carrying on of such an activity being a condition precedent to the allowance of the claimed deduction under the controlling Revenue Act.¹ The Circuit Court of Appeals affirmed.² Differing interpretations as to the meaning and scope of "carrying on any trade or business" prompted us to grant certiorari in this case, in the case of *Pyne v. United States*, 35 F. Supp. 81, and in the case of *Higgins v. Commissioner*, 111 F. (2d) 795, 311 U. S. —.

In the *Higgins* case, decided on February 3, we affirmed the judgment of the same Circuit Court of Appeals that rendered the decision below. *Higgins*, an individual taxpayer whose activities did not vary materially from the activities of the taxpaying trusts in the case at bar,³ was denied the deduction which peti-

¹ Revenue Act of 1928, §§ 23(a), 161, 162. Cf. *George Vanderbilt Trust*, 36 B. T. A. 967. Though petitioner urges that the Commissioner, because of concessions made before the Board of Tax Appeals, should be barred from asserting that the trusts were not carrying on business, the judgment of the Board rested on its finding that the trusts were not so engaged, and the issue is properly before us.

² 112 F. (2d) 457.

³ The Board found in this case that the trustee's activities were limited to reviewing the stocks and bonds in trust several times a year; selling securities and reinvesting the proceeds in other stocks and bonds; collecting interest and dividends on security; keeping account books for the trusts and rendering statements to the interested parties; preparing and filing income tax returns; and distributing income to the beneficiaries. Summarizing, the Board of Tax Appeals said, "The above facts demonstrate conclusively to us that this is a case of passive investment and not of carrying on a business, for not only is the trustee limited in its investments, but it is cautioned in effect to be a safe investor rather than a participant in trade or business, and, plainly carrying out the testator's injunctions, it conducts no business, because it has, as above seen, no expenses of conducting business other than the collection of coupons and mailing bonds, amounting to a few dollars, and an even more negligible amount for transfer stamps or notary fees. . . . Extensive authority need not be compiled to demonstrate that a mere passive investor, collecting interest and clipping coupons, and making a very few reinvestments, is not engaged in trade or business."

tioner here seeks. And sections 161-162 of the Revenue Act of 1928 provide: "The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust. . . . The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual. . . ." Since the trust is subject to the same rules as the individual, and since the findings of the Board of Tax Appeals in the *Higgins* case and in the case at bar are substantially the same,⁴ the *Higgins* case is controlling here, unless, as petitioner contends, distinguishable by reason of administrative practice in relation to trusts.

But we regard the *Higgins* decision as controlling despite petitioner's insistence that administrative practice has long permitted deduction of trustees' commissions. In view of the express Congressional command that the same method and basis of computation must be applied to trust income as to individual income, it is doubtful whether any administrative practice, no matter how clear or long existing, would warrant our applying one concept of carrying on business in the case of an individual and another concept in the case of a trust. This is particularly true here, where the statutory interpretation petitioner urges has never received support in any regulations promulgated by the Secretary of the Treasury.⁵ And not only is the result reached by the court below consistent with our decision in *Higgins v. Commissioner*, but, as we said in the *Higgins* case, the conclusion of the Board of Tax Appeals "is adequately supported by this record, and rests upon a conception of carrying on business similar to that expressed by this Court for an antecedent section."⁶ The judgment below is accordingly

Affirmed.

⁴ It is clear that the Board was justified in reaching the conclusion that the instant trusts were not "business trusts" but existed merely to hold and conserve property and distribute the income received. Compare *Morrissey v. Commissioner*, 296 U. S. 344, 356-357; *Van Baumbach v. Sargent Land Co.*, 242 U. S. 503, 515; *Zonne v. Minneapolis Syndicate*, 220 U. S. 187.

⁵ *Biddle v. Commissioner*, 302 U. S. 573, 582; *Helvering v. New York Trust Co.*, 292 U. S. 455, 467-468.

⁶ The case referred to was *Van Wart v. Commissioner*, 295 U. S. 112, 115.